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SECOND CHAMBERS IN THEORY AND PRACTICE

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To

J. E. L.-S.

PREFACE

THIS book surveys the more important Second Chambers of the world, but its illustrations are chiefly drawn from the experiences of the British Dominions. In the case of foreign countries, owing to the difference between their needs and our own, the conclusions that can be safely derived from them are strictly limited. But the Dominions furnish us with a variety of experiments made by peoples possessing many of our own traditions and with constitutions created upon the British model.

I offer my thanks to Professor Berriedale Keith for his revision of the chapters on the Dominions, Sir William Beveridge, Professor Graham Wallas and Mr. H. J. Laski for the care with which they read through the manuscript of this book, Professor Vaucher and Mr. Finer for kindly looking through the appendix on France, and Miss Kathleen Walker for preparing the manuscript.

Earl Beauchamp and the Rt. Hon. J. A.

Murray Macdonald have furnished me with the minutes and memoranda of the Bryce Conference on the Reform of the Second Chamber, and Mr. M. M. Mjelde of the Norwegian Foreign Office obtained for me with considerable trouble the material necessary for the chapter on Norway. Portions of the chapters on Norway and South Africa have appeared in articles in the *Journal of Comparative Legislation and International Law.*

H. B. LEES-SMITH.

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Second Chambers in Theory and Practice

CHAPTER I

THE PARLIAMENTARY MACHINE

The Parliamentary Machine.

THE problem of the Second Chamber in this country must be discussed within the special setting provided by British needs and conditions. This book, therefore, begins with an account of our system of parliamentary government and the functions within it usually assigned to a Second Chamber.

The visitor to the House of Commons during question hour will see the most important members of the Cabinet sitting on the front bench to the right of the Speaker. Here are the men who hold in their hands more material power

than any others in the world, and control the government of the country. But looked at from another angle they constitute a quite different body. They are the orators, leaders and central directing body of the party that won the victory at the last election. This is the first outstanding feature of our parliamentary system. Party is the "invisible government" of the country that dominates practically every act of the House of Commons. An account of the working of the parliamentary machine must, therefore, begin with a description of our party organisation.

The Party System.

The creation of a party is an extraordinarily difficult achievement. An effective party needs a central organisation with funds running into hundreds of thousands, or even millions, of pounds. It requires a local organisation in almost every constituency, which, as it must fight municipal as well as national elections, must extend to most of the wards of the constituency. These local organisations raise funds which altogether amount to a sum equivalent to those controlled by headquarters. The party maintains an army of officials, agents, district organisers, speakers, headquarter officers, and

special women's organisers, who constitute a profession sufficiently compact to have begun forming trade unions of their own.[1] It subsidises newspapers, and publishes a series of special weekly or monthly papers for circulation amongst members of the party, including journals devoted exclusively to technical questions of political organisation. It must be prepared when a general election comes, to flood the country with millions of leaflets, pamphlets, posters, special newspaper articles and appeals. But the foundation upon which all this elaborate organisation rests in each constituency is the group of voluntary workers. No expenditure of money or work of paid agents can keep a party organisation in health unless life is breathed into it by a band of devoted adherents, who retain their zeal during the listless intervals between elections, attend dreary committee meetings, and do the unobtrusive work of organisation without expectation of personal reward. When a new party comes into the field, the best test of its chance of life is whether it has something in it which sufficiently appeals to the minds of men and women to raise up these bands of

[1] The Association of Labour Agents demands a standard salary of £300 a year for its members.

disinterested volunteers throughout the country, and to keep their zeal alight from year to year.[1]

A party machine, therefore, is the result of such prolonged labour and persistence that it cannot be created, under normal political conditions, in less than a generation. The latest machine—the only one that has been built up from wholly new foundations in modern British politics—is that of the Labour Party. The

[1] The local party association in each constituency is made up mainly from this group of active spirits. This body is by no means the caucus that it is said to be. (See Mr. H. G. Wells' *The Disease of Parliaments*.) Its members are drawn from that small proportion of the population that has a store of surplus vitality to give to movements larger than their personal lives, and who, between them carry on their shoulders the work of the churches, the chapels, the trade unions, the co-operative societies and other organisations that call for unpaid labour. They carry out duties essential to the proper working of democratic politics. They are an important means of keeping ministers and members of Parliament informed of the state of public opinion, for they derive their knowledge from personal contact with the electors in whose midst they live. They follow the member's proceedings in Parliament and are ready to call him to account if he too flagrantly neglects his duties and departs from the policy on which he was elected. Without them this would be nobody's business. They almost invariably carry out these duties with great consideration and in a spirit of generosity, looking on their member as the standard bearer who has led them to victory. A member who cannot carry his local association with him on all ordinary occasions has probably defects of his own to account for it.

history of its creation stretches over fifty years and shows the nature of the task that such an attempt demands.[1]

When, however, a party machine has once been created, it becomes as truly a part of the working British Constitution as the House of Lords or the Crown, and its influence can be seen behind all the main decisions of the Government.

The results of party organisation upon the working of the constitution are of great import-

[1] The chief events in the history of the Labour Party can be briefly stated. In 1857 George Jacob Holyoake, who put himself forward as a candidate for the Tower Hamlets division, claimed that his enterprise was the first attempt to secure Labour representation in Parliament. He did not finally go to the poll. The first two Labour members were Mr. Thomas Burt and Mr. Alexander Macdonald, who were returned to Parliament in 1874. The number had grown to 12 by the election of 1895. Up to this period most of the members had worked through the Liberal Party and had been Liberal-Labour members. In 1900 the decision was taken to establish "a distinct Labour group in Parliament who shall have their own whips," and the modern Labour Party came into existence as an independent organisation. Two members were returned to Parliament under the new auspices in 1900, 20 in 1906, 40 in January 1910, 42 in December 1910, 47 in 1918, and 142 in 1922. This record indicates the nature of the task involved in the creation of a party. The interval between the last general election and the return of the first two Labour members of Parliament covers a period of nearly fifty years.

ance to the later discussions in this book. The first result is that the course of legislation is determined not only by the open conflicts in the House of Commons, but also by the internal conflicts within each party. The public battle over a measure by means of the Press, Parliament and the platform is not the first campaign in its history; for that was fought out in the inner, and probably private struggle within the party, by which that measure was included within its policy. If a section of a party can force a measure onto its programme and keep it there, they have a fair prospect that the party will one day come into office and carry the measure into law. The importance which working politicians attach to the party machine is revealed by the ferocious though mainly silent conflict that takes place for its capture, when a party is on the verge of a schism. The section that loses the machine must either make up its mind to spend a generation in the wilderness, or to be driven to dependence on the machine of the opposite party.[1]

[1] When Mr. Chamberlain left Mr. Gladstone in 1886 he failed to capture either the central organisation or more than a few of the local organisations of the Liberal Party. He created a new organisation but was forced to depend mainly on that of the Conservative Party and to enter into

The Two-party System.

The second series of results which flow from the party system are due to a specially Anglo-Saxon characteristic—our preference for the two-party system rather than the continental method of government by a number of groups. The consequence of this tendency is that the Cabinet has a more complete ascendency over Parliament than in any other country in Europe. This ascendency is far from being autocratic. The relations between the Cabinet and its followers in Parliament are those between the leaders and the chief officers of a party based upon voluntary service. These officers can be led but they cannot be driven in any direction that they are firmly determined not to go. But when a Cabinet is supported by a single party with only one party machine, all those obstacles that have been shown to beset the task of creating a new machine act as a deterrent to any minority which wishes to rebel.

a practical fusion with it (see Morley's *Life of Gladstone*, Book II, chap. vii). When Mr. Lloyd George dethroned Mr. Asquith in 1916, he failed to carry the majority of his party organisations with him. Although he attempted to build up a new machine of his own (the Liberal Coalition organisation) he was, like Mr. Chamberlain, forced to depend mainly upon the Conservative organisation and was compelled to resign office when it withdrew its co-operation.

When, for example, Mr. Chamberlain carried the bulk of the Unionist Party with him in his proposals for Tariff Reform, an influential section of the Party—headed by the Duke of Devonshire—refused to follow him and had considerable support—particularly in Lancashire. But this group of Free Trade Unionists were unable to create an effective party organisation. The result was that they soon ceased to count as an independent political force. Some disappeared from public life, others went over to the Liberal Party, and the remainder accepted the new programme and came back to the Unionist Party.[1] When, on the other hand, a government depends for support upon a combination of groups, each group is already accustomed to separate action; it possesses its own independent organisation and can break away from the government without fear of extinction. This is one of the reasons that the average life of a government is so much longer in England than in France. The harsh powers which assist the maintenance of discipline in a single party are strengthened by the sentiment of *esprit de corps*. The devotees of a party acquire towards it much of the love of a religion.

[1] Bernard Holland's *Life of the Duke of Devonshire*, vol. ii, pp. 372 *seq.*

The personal animosities which become dangerous between members of different groups are kept in control in a single party by the sense of comradeship which grows up among men who have fought side by side for a large part of a lifetime.

The whole procedure of the House of Commons has gradually adapted itself to the two-party system. One of the most striking developments in modern parliamentary history is the long series of decisions, debates, reports of committees and Speaker's rulings, by which the House of Commons—consisting of private members jealous of their rights—has reluctantly given the Cabinet continuously increasing power over the expenditure of parliamentary time. Standing orders give Government business precedence over that of private members for three-fourths of the session,[1] and the Government, supported by its majority, can always follow this up by a special resolution taking all or part of the time still left to private members. On the days thus set aside for Government business it is arranged in whatever order the Government decides,[2] and the length of time given to the discussion of the main measures can be determined by the Government, with the support of its party, through its powers

[1] Standing Order, 4.

[2] *Ibid.*, 5.

under the closure.[1] Thus the two-party system has converted the House of Commons into an assembly, where the leaders of the majority party can occupy the bulk of the time for their own business, determine what Bills members shall discuss, and how much time they shall devote to each Bill and to each clause of it.

But the question arises whether these features of our parliamentary life are likely to be permanent. No certain answer is possible, but the causes that have led to the present system appear to be so fundamental that they are unlikely to disappear. The group system will naturally arise in a country where a number of particular issues, such as Roman Catholicism, Royalism or the rights of nationality so obsess the minds of their adherents as to make national issues seem of secondary importance. Under such circumstances groups are formed around these special questions and cut across the lines of division represented by national parties. In the only case where such a question has emerged in our recent political history—the Irish problem—it led to the formation of a group exclusively devoted to it. Other causes of the group system are to be found in national temperament. British elections are usually fought on concrete

[1] Standing Orders, 26 and 27.

issues, whereas it is frequently observed that in France election addresses tend to be statements of general political philosophy. But on the question of an actual Bill there are usually only two practicable replies—yes or no; whereas in political philosophy there is an infinite variety of alternatives, which are likely to find expression in a multiplicity of groups.[1]

To these general causes are added the effects of our electoral methods. The system of single-member constituencies, without a transferable vote, forces politics into the two-party groove. If two groups are akin to each other, but insist on fighting each other at an election, the votes of their supporters are split between the two, and the party most alien to each profits by the division. The struggle between the two groups may continue long enough to determine which is the more powerful, but the whole pressure of events is towards either amalgamation or the absorption of the weaker group by the one with more vitality.[2]

[1] Cp. Lowell's *Public Opinion and Popular Government*, pp. 81 *seq.*

[2] The single-member constituency is not necessarily a permanent feature of our electoral system. During the passage of the Representation of the People's Act of 1918 a scheme of Proportional Representation was only defeated by seven votes in the first vital division on the subject in the House of Commons (Parliamentary Debates, June 12,

The Effect of the Group System on the House of Commons.

The appearance of the group system of the French type does not seem probable in this country. But if it did appear, would it neces-

1917), and was carried through the House of Lords by large majorities. As one purpose of proportional representation is to give each small minority a number of representatives in Parliament proportionate to its strength, it is frequently argued that it will lead to the birth of the group system. Experience is not yet available to enable us to answer whether this would be the case. The system has now been adopted in about half the countries in Europe (See the Report of the Proportional Representation Society for year June 1921, pp. 6–9, May 1922 ; and " Proportional Representation in Modern Legislation," by J. Fischer Williams in the *Journal of Comparative Legislation* for January 1921). But in most of them it has been introduced since the end of the war, and it is only in Belgium, where it was adopted in 1899, that it has had a life of any length. In Belgium " the paradoxical result of the introduction of proportional representation has been the virtual extinction of small parties " (Report of Royal Commission on Electoral System, 1910, p. 19). In Tasmania, the only other country with a long experience of the scheme, the result of the first election fought under it, in 1909, was to reduce a three-party to a two-party system (Report of Royal Commission on Electoral Systems, p. 31). Under these circumstances it is not possible at present to go beyond the general conclusions of the Royal Commission on Electoral Systems that " the multiplication of small parties feared by opponents of proportional representation is exaggerated in the evidence given before us " (Report of the Commission, p. 32).

sarily lead to the French consequences? It is generally assumed that instability of government is an inevitable accompaniment of the group system. President Lowell in his studies of party government has always insisted upon this result: "The larger the number of discordant groups that form the majority, the harder the task of pleasing them all, and the more feeble and unstable the position of the Cabinet. A Cabinet which depends for its existence upon the votes of a Chamber can pursue a consistent policy with firmness and effect only when it can rely for support on a compact and faithful majority; and therefore the parliamentary system will give the country a strong and efficient government only in case the majority consists of a single party."[1] But as the examples taken from President Lowell are drawn from continental politics the results cannot be safely applied to British, or indeed Anglo-Saxon conditions. The peculiar features of the House of Commons are as much an offspring of the British political temperament as the constitution itself. This temperament would probably still assert itself under a group system. Group government in France is unstable because

[1] Lowell's *Government and Parties in Continental Europe*, vol. i, p. 73.

groups have not learnt the art of continuous co-operation. But the British, with their capacity for "give and take," would probably work a group system so that a *bloc* once made would hold together with all the tenacity needed for a stable government. Party discipline would lose some of its severity, but its present stringency is much greater than is necessary for a steady administration and is regarded by party leaders themselves as excessive.[1] The essential characteristics of the House of Commons as they have been described are, therefore, likely to endure through any changes in party structure that can be foreseen.

The Control of Administration.

The discussion has hitherto been confined to legislation, but the function of a Government is not merely to make laws but to administer them. Its work in the executive realm is now quite as important as in legislation, and the

[1] "There has been a tightening of discipline, which, on the whole has not been an advantage. I should be very glad to see it lessened. It is the tightness of party machinery which is the cause of one of the greatest evils of the present day. The result of our system is that if great Party bills cannot be forced through with decent debate, they have to be forced through without it" (Mr. Bonar Law, House of Commons, March 14, 1913. Cp. also the remarks in the same debate by Mr. Asquith and Lord Robert Cecil).

discussion of Second Chambers must include that of their efficiency in the former sphere.[1] Since the close of the war most of the major decisions which have shaped the course of events have not been taken in Parliament, but by such methods as conferences, Cabinet meetings, committees and informal discussions between ministers and officials.[2] The importance of the executive side of Government is continuously magnified by the expansion of the duties and powers assigned to Government departments. Public attention has been fastened upon this development since the end of the war by the increase of expenditure upon the civil and other services, but it was steadily in operation before the war.[3]

[1] See Lord Robert Cecil's evidence before the Select Committee on House of Commons' Procedure (House of Commons Paper. 378 (1915), pp. 55, 57). For the views of Lord Palmerston and Sir Henry Campbell-Bannerman, see Redlich's *Procedure of the House of Commons*, vol. i, p. 114.

[2] The widest powers of the Government are derived from the ancient rights by which the control of the Army, Navy, and of foreign policy were part of the prerogative of the Crown. The Crown still retains its prerogative in law, but by the establishment of the doctrine that it acts upon the advice of its Ministers these vast realms of policy have fallen into the hands of the Ministry.

[3] See the tables showing the growth of this expenditure between 1887 and 1912, in Mallet's *British Budgets*, pp. 465–472, 506 and 509.

It is strikingly illustrated by the growth of the sub-legislative power of Government departments. Half the Acts of Parliament of recent years have delegated the right to make Rules and Orders to different Government departments acting either directly or through such authorities as the Privy Council, the Lord Chancellor, the Electricity Commissioners, or the Judicial Committee of the Privy Council.[1] Parliament usually keeps the final authority in its own hands by laying down provisions by which such rules and orders must be laid before the two Houses—in some cases before and in some cases after they have been issued—for varying periods, generally forty days. The usual provision is that if within this period an address for the amendment of the Rule or Order is carried in either House it is withdrawn.[2] In

[1] Carr's *Delegated Legislation*, p. 49.

[2] Cp. Erskine May's *Parliamentary Practice*, pp. 568, 569. In some cases the rule cannot come into operation unless a positive resolution of approval has been carried in both Houses. The provisions covering a great number of these Rules and Orders are contained in the Rules Publication Act of 1813. In order that members may know the Rules and Orders which are at any moment lying upon the Table of the House for their appointed period, a list of them is printed weekly and can be obtained by members in the Vote Office (See *House of Commons Manual of Procedure*, p. 32).

practice many years elapse between the rare instances in which either House uses its powers to insist upon the formal withdrawal of an order, but pressure by other means which will be described can be applied at any moment. Rules and Orders vary widely in importance, but their actual bulk each year has for the last thirty years exceeded that of the Acts of Parliament for the year.[1] These facts make it evident that the function of the House of Commons in discussing executive policy is fully as important as in discussing Bills.

It is frequently assumed that as Parliament is a legislative body the control of the House of Commons over executive policy is very much weaker than over Bills. This belief can be seen to be untrue by looking behind outward parliamentary forms to the real methods by which decisions are taken. The chief occasions for discussing administration are during the debates upon the Address, the Estimates, the Consoli-

[1] In 1920 the annual volume of Public General Statutes occupied 600 pages, whilst the two volumes of Statutory Rules and Orders occupied 3,000 pages. Over eight hundred were issued in that year. Their number has trebled since 1890. The provisions by which time is set aside for the discussion of these Rules and Orders are explained in the official *House of Commons Manual of Procedure*, pp. 29–32.

dated Fund and Appropriation Bills, the adjournments at the close of each day and for the holidays, such special occasions as votes of censure and urgency motions for adjournment and during the question hour each day.[1] But all these occasions together do not afford opportunities for obtaining an actual division upon concrete issues of policy, comparable in number to the incessant divisions on every point of a Bill. But the comparative scarcity for the opportunities for divisions is counterbalanced by the frequency of opportunities for revealing the sense of the House. This is a most potent and pervasive force, the influence of which has been well explained by Lord Balfour: "Whatever crimes successive governments are guilty of, it does not amuse them to bully their followers. They do not like the operation. It does not add to their popularity with their friends; it is a matter of scoffing for their political opponents, and for their own convenience they would much rather, I am sure, let the House run loose."[2] The truth of Lord

[1] An interesting review of these opportunities was given by Lord Balfour in his evidence before the Select Committee of 1914 on House of Commons procedure (House of Commons Paper, 378, 1915, p. 85).

[2] In Lord Balfour's evidence before the Select Committee on House of Commons Procedure, p. 75, of the Report of House of Commons Papers, 378 of 1915.

Balfour's words is illustrated at Question Hour. From eighty to one hundred questions are put and answered orally by Ministers, on each complete parliamentary day. A question and the string of supplementary questions and answers to which it can lead, enables a summary debate on any point of policy to be held and to be repeated day by day. Ministers are always making and unmaking their reputations and will not readily face a daily bombardment of questions from a House which shows its hostility by methods free from the trammels of the division lobby. The result is that the control of the House on executive policy is quite as effective as it is over legislation.

CHAPTER II

THE THEORY OF A SECOND CHAMBER

THE latest statement of the functions of a Second Chamber is contained in the Report of the Conference on the Reform of the Second Chamber, which met in 1917 and 1918, under the chairmanship of Lord Bryce. This conference, which is discussed in a later chapter, consisted of thirty members drawn in equal numbers from the House of Commons and the House of Lords, and representing all political parties. Although the conference, to which I shall refer as the "Bryce Conference,"[1] did not succeed in reaching a unanimous report, it was found that there was general agreement that the following were the functions of a Second Chamber:[2]

1. The examination and revision of Bills brought from the House of Commons, a function which has become more

[1] Cd. 9038.

[2] Page 4 of Lord Bryce's letter on the results of the conference.

needed since, on many occasions, during the last thirty years, the House of Commons has been obliged to act under special rules limiting debate.

2. The initiation of Bills dealing with subjects of a practically non-controversial character which may have an easier passage through the House of Commons if they have been fully discussed and put into a well-considered shape before being submitted to it.

3. The interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it. This would be specially needed as regards Bills which affect the fundamentals of the Constitution or introduce new principles of legislation, or which raise issues whereon the opinion of the country may appear to be almost equally divided.

4. Full and free discussion of large and important questions, such as those of foreign policy, at moments when the House of Commons may happen to be so much occupied that it cannot find sufficient time for them. Such discussions may often be all the more useful if conducted in an assembly whose debates and divisions do not involve the fate of the executive Government.

The third function is the one which arms the Second Chamber with the widest powers, and is so much the most important of the four that I shall now discuss it and the problem that it raises separately. The main function of a Second Chamber is " the interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed."

There has been of late a certain change in the conception of the chief function of a Second Chamber. A century ago it was usually argued that a popular electorate would be subject to such fluctuations of opinion that a Second Chamber was necessary to protect the conservative elements of the State. But it can be replied that the conversion of many millions to a new idea is such a gradual process, that autocracies and oligarchies are more liable to rapid changes of thought than democracies. British democracy is a slow moving machine, which, in general, needs to be urged on rather than impeded. But the main reason for the change is that the defence of a Second Chamber in a democratic state needs to be based upon a democratic foundation.[1] The House of Lords has for many years accepted this fact, and has claimed to act as the ally, and not the opponent, to the popular will. The argument is simple. The House of Commons is elected for five years on one or two leading issues, which are probably disposed of within the first year. During the remaining

[1] See Lord Salisbury's speech upon the Irish Church Bill, and the views of the Duke of Devonshire in Holland's *Life of Duke of Devonshire*, vol. ii, p. 406.

four years for which the House may live, there is no necessary security that it is carrying out the will of its electors, especially in those new issues which are bound to arise without, perhaps, a word having been said about them at the election. This is the modern justification for the House of Lords. When it refused passage to the Second Reading of the Finance Bill of 1909, embodying Mr. Lloyd George's famous Budget of that year, it carried a reasoned amendment to the effect that "This House is not justified in giving its assent to this Bill until it has been submitted to the judgment of the country."[1] When, at the ensuing general election a clear majority in favour of the Finance Bill was returned, the House of Lords allowed it to pass.

The argument is strengthened by the working of the party system. It was explained in the last chapter that a section of a party which succeeds in keeping its proposals for a sufficiently long time upon the party programme has a very good prospect of eventually forcing them on to the statute book. But a section of a party is not necessarily more than an insistent minority in the party, and is only a fraction of the people as a whole. Yet, under the system

[1] *House of Lords Debates*, November 22, 1909, p. 731.

of party government, it may impose its views upon the entire nation. "Party government leads to the strange but acknowledged result that a not unfairly elected legislature may misrepresent the permanent will of the electors. The party machine may be made the instrument for foisting upon the people of England changes, which revolutionary radicals or enthusiasts know to be reforms, but which the majority of the electorate, if they understood what was being done, might condemn as revolution or confiscation." [1]

The "revolutionary radicals and enthusiasts" have themselves in their recent writings been dwelling upon the same possibilities as those to which Professor Dicey calls attention, although their remedies are very different from his. They form one of the favourite themes of the Russian Communist propagandists. "Under the Parliamentary system each citizen casts his vote into the ballot-box once in four or five years, and the field is then clear for the Members of Parliament, Cabinet Ministers and Presidents, to manage everything without any reference to the toiling masses." [2]

[1] Dicey's *Law of the Constitution*, pp. xciv and xcvi of Introduction.

[2] *Soviets or Parliament*, p. 3, by Bukarin (Russian People's Commissary).

See also the Manifesto of the Third International, 1919.

In this country modern Socialist thought has further developed this line of criticism by insisting that since an election is fought on a multiplicity of issues, the electorate cannot pronounce a clear opinion on any of them, just as a jury could not pronounce a clear verdict on any one case if it were called upon to try a dozen cases simultaneously.[1] These Socialist thinkers, of course, draw their own conclusions from these arguments, the English Socialists

" The parliamentary system uses words to induce belief in popular participation in Government. Actually the masses and their organisations are held far out of reach of the real power and the real State Administration."

[1] " As long as the purposes of political government are few and limited, and the vast mass of social activities is either not regulated, or regulated by other means, such as the Mediæval Guilds, it is perfectly possible for a body of men to choose one to represent them in relation to all the purposes with which a representative political body has to deal. But as the purposes covered by political government expand, and more and more of social life is brought under political regulation, the representation which may once, within its limitations, have been real, turns into misrepresentation, and the person elected for an indefinite number of disparate purposes ceases to have any real representative relation to whose who elect him " (Cole : *Guild Socialism Restated*, p. 14).

See also the analysis of the elector into his four capacities, as consumer, producer, social citizen, and political citizen in *A Constitution for the Socialist Commonwealth of the United Kingdom*, pp. 79, 103, by Sidney and Beatrice Webb.

proposing to set up not two Chambers but two or more Parliaments, and the Russian Communists to sweep all Parliaments away. But the case for a Second Chamber is greatly strengthened by being directed at a defect which is fastened upon by the most opposite schools of political thought from English Conservatives to Russian Communists. The controversy is thus narrowed to the question of whether the Second Chamber is the best of the various alternative means by which the defect can be corrected.

Are the Dangers of Single Chambers Serious ?

This brings the discussion to the crucial question of how serious in fact the consequences of the defect are likely to be. Second Chambers are a clumsy and complicated addition to the structure of government. Simple intelligibility is a primary virtue in a constitution, and the complexities introduced by a Second Chamber of any elaboration can only be justified by the existence of great dangers. The argument for a Second Chamber is that the " mandate " of a general election is soon completed and that, thereafter, the House of Commons is able to act without reference to public opinion. But this view takes no account of the potent in-

fluences of the general election that is to come. Walter Bagehot, writing half a century ago, pointed out that the fear of elections in the future is in itself an effective check upon the House of Commons:

"The dangers arising from a party spirit in Parliament exceeding that of the nation and of a selfishness in Parliament contradicting the true interest of the nation, are not great dangers in the country where the mind of the nation is steadily political, and where its control over its representatives is constant. A steady opposition to a formed public opinion is hardly possible in our House of Commons, so incessant is the national attention to politics, and so keen the fear in the mind of each member that he may lose his valued seat." [1]

These words remain true to-day. Politicians of long experience agree that constituencies watch their members' actions with greater keenness to-day than a generation ago,[2] and the variety of means by which the public can express itself has multiplied in recent years.

This becomes evident if we compare the means possessed by the Government of gauging public opinion to-day, with those at its disposal when Bagehot wrote.

[1] Walter Bagehot: *English Constitution*, p. 241.

[2] See Lord Balfour's evidence in the Report of the Select Committee on House of Commons Procedure, 1915, p. 77; and Mr. Asquith's speech in the House of Commons, March 14, 1913.

The most obvious of these is the Press. Modern Ministers attach to its opinion an importance which is well known and, indeed, is excessive. The present conditions of newspaper production have thrown the control of the bulk of the Press into the hands of a very small number of men, backed by large capital.[1] It reflects and largely creates the opinion of the middle and upper classes, but it has far less influence amongst the mass of the working class—especially outside the largest towns. The bulk of them do not read the great morning papers but only evening or Sunday journals,[2] in which politics occupy a minor place. Their opinions are mainly formed as a reaction from their own lives. This explains the influence upon them of those special kinds of propaganda which are based upon their experience of life. It is often said that in the contest for moulding public opinion between the Press and the platform, the latter has lost its position. It is true

[1] See Lord Northcliffe's *Newspapers and their Millionaires.*

[2] This fact is responsible for the growing and very inconvenient practice by which ministers now deliver their chief public pronouncements at meetings held on Saturday afternoons in order to obtain the enormous publicity of the Sunday papers.

that formal public meetings do not now play the part that they did a generation ago. But their place has been taken among the working class by "propaganda from within" by means of discussions, arguments and lectures inside the factory, the mine, the trade union branch or the co-operative society. These are reinforced by leaflets, pamphlets, and that multitude of open-air meetings which are now far more important than indoor meetings of the Town Hall type for the creation of popular opinion. This rival to the power of the Press is one whose results Ministers find it difficult to measure. But in this task they can obtain considerable assistance from the opinion of the local party or organisation.

A further means of bringing opinion to the attention of Ministers has been greatly developed since Bagehot wrote. The streets which surround the Houses of Parliament are occupied by an ever increasing multiplicity of societies and organisations, each formed to deal with some social or political proposals, with offices, monthly or quarterly journals and secretaries who constitute a distinct profession. They supply questions to members of Parliament, paragraphs to newspapers, arrange for pledges to be extracted

from candidates,[1] lobby for their proposals when they are discussed in the House of Commons, and carry the practice of sending deputations to ministers to a fine art. As a result of these various factors, therefore, Governments are less likely to-day than in Bagehot's time to insist upon a policy that is robbing them of support.

The Effect of the Party System.

In addition the British tendency towards the two-party system strengthens the control of the people over the Government because the elector whose party secures power knows the main lines of the policy at which it will aim. But where, as in France, politics are broken up by a number of groups varying from six to twelve, the elector whose group achieves success and forms part of the Government has very little control over the final result, for that will emerge as the consequences of the bargaining within a combination in which his group is only one fraction. The closer control which the two-party system gives to the electorate is strengthened by the developments in parliamentary procedure that have been described. The broad result of

[1] At the general election of 1922, each candidate received over one hundred and fifty written questions from various organisations calling for written answers, in addition to those put verbally at meetings.

these developments is to give the Cabinet the maximum power to pass its measures through Parliament and so carry out the policy that the electors have supported. This again is in marked contrast to the weakness of the Cabinet under the continental type of parliamentary procedure.

Any system which helps to create a real public opinion strengthens the control of the people. The two-party system does this by preventing electors from voting on sectional issues, such as the position of the Catholic Church, the claims of some geographical group, or prohibition. An elector who votes on account of such a question as prohibition alone loses his control over all the rest of the national policy. Under the two-party system, elections are fought over the whole field of national policy and the voter is encouraged to come to his decision on broad and fundamental lines.[1] At the same time the task of the elector-

[1] This is illustrated by the developments within the Labour Party. The resolution that brought it into being called for a "Labour group who shall . . . co-operate with any party which for the time being may be engaged in promoting legislation in the direct interest of Labour." This foreshadowed a group concerning itself with nothing but direct Labour issues; and under the continental system this would probably have been the eventual outcome.

ate is simplified. Where the voter is confronted by a dozen different groups, it requires a professional politician to keep his head amidst the swarm of alternatives. Before he can choose between the various groups he has to undertake the preliminary task of distinguishing the shades of difference between each. The two-party system presents him with two broad alternatives, which, by bringing whatever differences of policy there are into bold relief, help him to form a real opinion upon them.

The Second Chamber and the Executive.

The conclusions to which these arguments lead is that the danger that the popular House will seriously misrepresent those on whom it depends for election, is not great enough to justify a Second Chamber which adds to the cumbersomeness of the Constitution. This opinion is reinforced by another fact. The most important decisions of government are now, as has been explained, the subject of executive rather than legislative action, and if the people are to be protected against being misrepresented, it is

But, working under our system, Labour has been compelled to extend its scope so that, in its congresses of the last few years, the bulk of the discussion has been devoted to foreign policy.

in this sphere that the need is greatest. But no Second Chamber proposed for this country is intended to control executive policy.[1] There are unanswerable constitutional reasons for this in a country with the Cabinet system of government, but the result is that over half or more of the field of public affairs the Second Chamber has no function to perform. An organ whose main duty is merely "the interposition of delay in the passing of a Bill into law,"[2] is too restricted in its scope to justify anything beyond a quite simple addition to the constitution.

The following chapters include a survey of the extent to which within their limited sphere the Second Chambers of the British Dominions and certain other countries have succeeded in carrying out the functions assigned to them. The most important requirement by which to test their experience is, that the Second Chamber should not become a mere party instrument. A Second Chamber which never refuses passage to measures from the Lower House when its own party is in office, and takes every opportunity to obstruct the measures of the opposing party, will increase rather than correct the distortion of the public will.

[1] See Bryce Report, p. 5.
[2] Idem, p. 4.

CHAPTER III

THE CANADIAN SENATE

THE present Canadian Federation arose out of the Quebec Conference of 1864. This assembly, which was composed of thirty-three delegates, representing Canada, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, laid down the main lines of the existing constitution.[1] The conference sat in private, and beyond the formal minutes of each day's proceedings no report of its discussions was published.[2] But the seventy-two resolutions which the conference carried, had to pass through the legislatures of each province and in 1865 were subjected to six weeks' debate in the Parliament of Canada.[3]

[1] Newfoundland has not yet entered the Federation.

[2] A meagre account of the discussions can be found in Sir Joseph Pope's *Confederation Documents*, but there is no report at all of the debates on five out of the six days that the question of the Second Chamber was taken up.

[3] Parliamentary Debates on the subject of the Confederation of the British North American Provinces, third

A considerable part of this discussion was devoted to the Second Chamber, and the full reports of it that have been preserved enable us to examine the arguments, principles, and hopes out of which the present Senate of Canada arose.

Canada's Previous Second Chambers.

By the time that the Quebec Conference met, Canada had already had an experience of both nominated and elected Second Chambers. By Pitt's Constitutional Act of 1791,[1] both the provinces of Lower and Upper Canada were furnished with a Legislative Council nominated for life by the Governor in the name of the Crown to be the Upper House of Parliament,[2] and an elected Assembly to be the Lower House. In both provinces the Legislative Council became the stronghold of the ruling minority. In Lower Canada it was mainly filled with English and Scottish to the exclusion of the French, and in Upper Canada with the descendants of the United Empire Loyalists and the other sections

session, Eighth Provincial Parliament of Canada. Printed by order of the Legislature. These debates will, in future references, be entitled "Confederation Debates."

[1] 31 George III, c. 31.

[2] It was to consist, in Upper Canada, of not less than seven, and in Lower Canada of not less than fifteen members.

that made up the "Family Compact," to the exclusion of the new settlers. In both provinces this system was one of the causes of the rebellions which broke out in 1837.[1]

Lord Durham's famous report upon the rebellion emphatically condemned the system on which both the Legislative Councils were constituted. "The present constitution of the Legislative Councils of these provinces has always appeared to me to be inconsistent with sound principles, and little calculated to answer the purpose of placing the effective checks which I consider necessary on the popular branch of the Legislature. The attempt to invest a few persons distinguished from their fellow colonists neither by birth nor hereditary property, and often only transiently connected with the country, with such power, seems only calculated to ensure jealousy and bad feelings in the first instance, and collision at last."[2] But when

[1] Bourinot's *Constitutional History of Canada*, pp. 25 *seq.* See also Lord Durham's Report, vol. ii, p. 150, of Sir Charles Lucas' edition, Oxford University Press.

[2] Lord Durham's Report, vol. ii, p. 325. See also his remarks upon their unrepresentative character, vol. ii, p. 82:

"The composition of the Legislative Council which has been so much the subject of discussion both here and in the Colony, must certainly be admitted to have been such as could give it no weight with the people, or with

Lord Durham and his advisers came to the alternative methods of constituting these Councils even their intrepid intellects had no practical guidance to offer. "It will be necessary, therefore, for the completion of any stable scheme of government, that Parliament should revise the constitution of the Legislative Council and by adopting every practicable means to give that institution such a character as would enable it, by its tranquil, safe, but effective working, to act as a useful check on the popular branch of the Legislature, prevent a repetition of those collisions which have already caused such dangerous irritation." [1]

No new Second Chamber could be built upon such vague generalities as these. The general tenor of Lord Durham's observations makes it evident that he considered that this problem was one that might wait until his larger reforms had been firmly established.

When, therefore, in accordance with Lord Durham's report, the two provinces of Upper and Lower Canada were united under a single govern-

the representative body, on which it was meant to be a check. . . . The Legislative Council was practically hardly anything but a veto in the hands of the public functionaries on all the Acts of that popular branch of the Legislature, in which they were always in a minority."

[1] Vol. ii, p. 326.

ment by the Union Act of 1840, a nominated Legislative Council of the old type reappeared as the Upper House in the new constitution. Members were to hold office for life and there was no limit to the number that could be appointed.[1] The former experiences were not, however, renewed. The acceptance of Lord Durham's solution—responsible government—dissolved the previous difficulties created by the Legislative Councils with the same success as the other troubles of the old regime. He had predicted this result in his report. "If the higher offices and the Executive Council were always held by those who could command a majority in the assembly, the constitution of the Legislative Council was a matter of very little moment, inasmuch as the advisors of the Governor could always take care that its composition should be modified so as to suit their own purpose."[2] These predictions were fulfilled. Legislative Councillors were appointed upon the recommendation of the Prime Minister who had the support of the popular House, and the previous deadlock between the two Houses came to an end.

[1] 3 and 4 Victoria, 1840, c. 35. [2] Vol. ii, p. 50.

[3] "The Lower House, in effect, pointed out who should be nominated to the Upper House, for the Minister being

This system, as will be seen later, contained the seeds of troubles of a new type which soon began to manifest themselves, but they did not produce immediate results of a grave kind. Yet in 1856 it was swept away, and a new experiment was begun. The explanation of this change is to be found in a series of extraneous events with which the Legislative Council was only indirectly concerned.

The Experiment of an Elective Second Chamber.

During the rebellions of 1837 and 1838, a great deal of the property both of rebels and loyalists had been destroyed. In 1841 the Tory Government of the newly united colony of Canada had granted compensation to those who had suffered loss in Upper Canada and had in 1845 expressed its intention of giving similar treatment to Lower Canada. In 1848 the Tory Government was defeated, and Canada found herself under a French Prime Minister—M. La Fontaine—one of whose first acts was to introduce the Indemnification Bill of 1849, to extend the process of compensation of Lower Canada.

dependent altogether on the Lower Branch of the Legislature for support, selected members for the Upper House from among their political friends at the dictation of the House of Assembly" (Mr. John A. Macdonald: *Confederation Debates*, 1865, p. 36).

The Bill was passed and received the assent of Lord Elgin, the Governor-General. The events which followed are now generally acknowledged to be among the most discreditable chapters of Canadian history. Passionate racial feeling immediately broke out. The British section in Montreal, where the Canadian Parliament was held, bitterly attacked Lord Elgin for assenting to the Bill. He was assaulted by the crowd and narrowly escaped with his life; the Prime Minister's house was sacked, and the Parliament buildings were burnt to the ground.[1] The Act was not affected by these proceedings, but the nominated Legislative Councils perished in the storm that had been raised. Members of the Legislative Council, as has been explained, were appointed by the Governor-General on the recommendation of the Prime Minister. The result of this system, about which much will be said in later pages, immediately revealed itself. The Prime Minister recommended mainly his own adherents, and the Legislative Council became a Party instrument. Of the first group of twenty-five councillors appointed in 1841, eighteen were conservatives and five reformers. As a result of these appointments, and those

[1] Professor G. M. Wrong's *The Earl of Elgin*, pp. 43 *seq.*, and Bourinot's *Lord Elgin*, pp. 31 *seq.*

that were made in subsequent years, the Liberals found when they came into power in 1848 that they were in a minority of fifteen in the Council. They accordingly recommended the appointment of twelve new members in order to raise themselves to a more equal level.[1] This step led to the downfall of the system of nomination. The Conservatives denounced this process of "swamping," and when the Council passed the Indemnification Bill by one vote they included the Upper House in their animosity against all responsible for the measure. The reformers of Lower Canada who had made a nominated Council the chief object of their attack during the events which led to the rebellions of 1837 and 1838 rekindled their opposition, so that the Legislative Council found itself assailed on both sides. The Councillors refused to continue the thankless task of attending in their places.[2]

[1] Sir E. P. Taché: *Confederation Debates*, p. 238.

[2] "Session after session, day after day, week after week, we saw the Speaker come into the Council with great pomp, preceded by the mace; and after the Speaker had made his usual dutiful bow to the Throne, he would take his seat and remain quietly in the Chair for the space of one hour. At the end of that hour, he would consult his watch and, saying there was no quorum present, he would declare the House adjourned until the following day" (Sir E. P. Taché: Canadian Legislative Council, February 16, 1865).

The result was, as one of the Ministers subsequently explained, that the system of nomination gave way to one of election, " not on account of any predilection on our part for the elective system, but because it was necessitated by the circumstances in which the country found itself placed." [1]

In 1856, therefore, Canada turned to the system of an elective Second Chamber. The province was divided into forty-eight electoral divisions for each of which a Councillor was elected by the same electors as were qualified to vote for members of the Lower House.[2] Councillors were elected for eight years, and had to possess a property qualification of eight thousand dollars. In order to ease the transition from the old system to the new, the existing Councillors nominated before July, 1856, were permitted to continue in their seats for the rest of their lives.

The Abandonment of the Elective Chamber.

When the Quebec Conference met in 1864, the new system of election had been in operation for eight years. The result of this experience

[1] Sir E. P. Taché: *Confederation Debates*, p. 235.

[2] Canadian Act: 19 and 20 Victoria, c. 140, s. 1 and 12.

was, that with very little opposition the conference determined to abandon it and to return to nomination for life.[1] The first reason for this was that it was felt that an elected Senate would claim that it had a right to co-ordinate authority with the House of Commons, and that to grant any such claim was inconsistent with the smooth working of Parliamentary government. It is a tribute to the sagacity of the framers of the federation to notice that this point, which has since become the central argument against an elective Second Chamber, was anticipated by the leading speakers in the Canadian Parliament of 1865.[2] The second and the more conclusive reason was the enormous expense of the elections for the large constituencies that the system

[1] The only opposition came from Prince Edward Island.

[2] "The real danger of collision would be where one Chamber invaded the prerogatives of the other, and that danger, if it existed at all, would be greatly increased were the Legislative Council made elective. If the members were elected they might say, 'We come from the people just as directly as the members of the Assembly do, and our authority is, therefore, as full and complete as theirs. We have therefore, as much right to initiate Money Bills as they have'" (Mr. Campbell: *Confederation Debates*, p. 22. See also the speeches by Mr. John A. Macdonald, pp. 37 *seq.*, and Mr. Alexander Mackenzie, p. 246).

involved, estimated by one of the speakers to be between £3,000 and £4,000.[1] It is strange that no proposal was made to overcome these difficulties by vesting the election of the Senators in the Parliaments of the province. This solution was not open to Lord Durham—as he left no provincial Parliaments—but at the moment when Canada was creating a Federal government the obvious method of electing the Senate would have been on the federal plan followed in the United States. A few years later, the proposal appeared to command general sympathy in Parliament.[2] Yet at the time of confederation there is no trace of its being ever mentioned in the debates of either the Quebec Conference or the Canadian Parliament.[3]

[1] "The expense was so enormous that men of standing in the country, eminently fitted for such a position, were prevented from coming forward. At first, men of the first standing did come forward, but we have seen in every succeeding election an increasing disinclination to become candidates" (Mr. John A. Macdonald: *Confederation Debates*, p. 25. See also the speeches by Mr. George Brown, pp. 89 *seq.*, and Sir E. P. Taché, pp. 241 *seq.*).

[2] *Life of Alexander Mackenzie*, Buckingham and Ross, p. 391.

[3] The explanation is partly to be found in the strong preference of Mr. John A. Macdonald and others for unification. If the provincial assemblies were to be mere local councils their choice of Senators would be undesirable.

The Composition of the Senate.

Canada, therefore, reverted to the system of a Senate composed of members nominated for life. This Senate, which has undergone no fundamental change since 1867, must now be described more fully.[1] It consists at present of ninety-six members. For membership of the Senate Canada is divided into four divisions representing the four naturally differentiated areas of the country—Ontario, Quebec, the Maritime Provinces and the Western Provinces.[2] The Senate gives equal representation—twenty-four members each—to the four main areas, irrespective of their population, and was intended to be the special protection of provincial interests.[3]

[1] The present numbers of the Senate and the distribution of its members between the provinces of Canada are determined by the British North America Act, 1867 (30 and 31 Victoria, c. 3), and the following amending Acts:—British North America Act (34 and 35 Victoria, c. 28), 1871; British North America Act (49 and 50 Victoria, c. 35), 1886; British North America Act (5 and 6 George V, c. 45), 1915.

[2] British North America Act, 1915.

[3] "There are three great sections having different interests in the proposed confederation. We have Western Canada, an agricultural country far away from the sea, and having the largest population who have agricultural interests principally to guard. We have Lower Canada, with other separate interests, and especially with institutions and laws which she jealously guards against

This view of its functions was especially apparent in the original proposal of the Quebec Resolutions that the members from each province should be nominated by the Government of the province,[1] which, however, dropped out during the discussions in London with the Colonial Secretary,[2] and was not included in the British North America Act of 1867.

Any expectation that the Senate would protect the claims of the province has been completely disappointed. It has frequently been in conflict with the House of Commons, but, as will be explained shortly, the lines of cleavage between the two Houses have had no reference whatever to provincial interests.

absorption by any larger, more numerous, and stronger power. And we have the Maritime Provinces having also different sectional interests of their own, having, from their position, classes and interests which we do not know in Western Canada. Accordingly, in the Upper House . . . it is provided that each of these great sections shall be represented equally by twenty-four members" (Mr. John A. Macdonald: *Confederation Debates*, p. 35). See also Sir E. P. Taché: *idem.*, p. 234: The addition of the fourth division—the Western Provinces—to the three original divisions was carried out by the British North America Act of 1915.

[1] Resolution No. 14.

[2] It does not appear in the Resolutions passed by the Conference of Delegates, on December 4, 1866. See Pope's *Confederation Documents*, p. 100.

The Powers of the Senate.

The special interest of the Canadian Senate to other countries arises from the method by which its members are nominated. But the subject cannot be properly discussed without first examining the powers that the Senate exercises. They are equal to those of the House of Commons excepting that, by law, Money Bills must originate in the House of Commons[1] and that, by the usual convention, whilst the Senate may reject Money Bills it may not amend them.[2] The only provision that is made for adjusting disagreements between the two Houses is, that the Governor-General[3] may at any time add either four or eight members to the Senate, choosing an equal number from the four divisions of Ontario, Quebec, the Maritime Provinces and Prince Edward Island, and the Western Provinces.[4] Beyond this very limited power of "swamping," new members can only be added to the Senate

[1] British North America Act, 1867, s. 53.

[2] The Senate exercises a special quasi-judicial jurisdiction in the case of Divorce Bills. See Bourinot's *Parliamentary Procedure and Practice in Canada*, c. xxxi.

[3] Additions to the Senate by its Governor-General can only be made on the direction of the King, to whom personally the subject must be referred.

[4] See British North America Act, 1867, s. 53, as amended by the British North America Act of 1915, s. 1.

as existing members die or retire. The power to "swamp" has only once been requested by a Canadian Prime Minister.[1] On that occasion it was refused by the Colonial Secretary on the grounds that it could only be properly used in case of a complete deadlock between the two Houses and where the balance of numbers was so even that the new members could turn the scale.[2] This refusal was made nearly half a century ago. A similar request at the present

[1] By Mr. Alexander Mackenzie when he came into office. No actual deadlock had arisen, but in 1873 he found that the Senate contained an overwhelmingly Conservative majority and made his request for the purpose of helping to redress the balance (See Buckingham and Ross's *Alexander Mackenzie and his Times*, p. 389).

[2] "I am satisfied that the intention of the framers of the twenty-sixth section of the British North America Act of 1867 was that this power should be invested in Her Majesty, in order to provide a means of bringing the Senate into accord with the House of Commons in the event of an actual collision of opinion between the two Houses. You will readily understand that Her Majesty could not be advised to take the responsibility of interfering with the Senate, except upon an occasion when it had been made apparent that a difference had arisen between the two Houses of so serious a nature and permanent a character that the Government could not be carried on without her intervention, and where it could be shown that the limited creation of Senators allowed by the Act would apply an adequate remedy" (The Earl of Kimberley's dispatch, Canadian Sessional Papers, 1877, No. 68).

day would no doubt be granted, as the modern doctrine of responsible government would assert that the proper authority to decide whether or not the power should be exercised is the Canadian Prime Minister.[1]

The peculiarity of this provision, by which "swamping" is possible, but only when eight new members can turn the scale, is explained by its history. In the nominated Legislative Council that existed before the Confederation there was no limit to the number of Councillors that could be appointed. The appointment of twelve new councillors *en bloc* by the Liberal Government of 1848, was, as has been explained, one of the causes of the fierce resentment that led to the abolition of the system of nomination. The framers of the Confederation, therefore, determined to render such action impossible in future, by allowing no increase to the number of Legislative Councillors: "The provision in the Constitution that the Legislative Council shall consist of a limited number of members, will prevent the Upper House from being swamped from time to time by the Ministry of the day, for the purpose of carrying out their

[1] As late as 1900 Sir Wilfrid Laurier would have been refused an addition had he applied for it, but learning this he refrained from any formal action.

own schemes or pleasing their partisans." [1] The Quebec Resolutions, accordingly, permit of no increase under any circumstances to the numbers of the Second Chamber. When, however, the delegates went to England, Lord Carnarvon, the Colonial Secretary, in the course of the discussions, expressed misgivings because there was no means of resolving any deadlock that might arise between the two Houses[2] and after an alternative scheme of an elaborate character had been suggested by the delegates,[3] the final solution reached was that a limited power of "swamping" up to three or six members should be permitted.[4]

[1] Mr. John A. Macdonald: *Confederation Debates*, p. 36.

[2] Pope's *Life of Sir John A. Macdonald*, vol. i, p. 275.

[3] Letter from Sir John Macdonald to Lord Carnarvon, Pope's *Life of Sir John Macdonald*, vol. i, p. 275.

[4] The members have been increased to four or eight by the British North America Act, 1915.

CHAPTER IV

THE CANADIAN SENATE—(*continued*)

The Character of the Senate.

WE now reach the most interesting feature of the Canadian Senate. It has already been mentioned that the founders of the Confederation determined to return to the original system of constituting the Second Chamber of members nominated by the Governor-General, and holding office for life. The special importance of the Canadian Senate lies in the fact that it enables us to examine the experience of half a century of the system of life nomination.

The picture of the House of Lords was evidently in the minds of the creators of the federation, and a Chamber based upon nomination for life appeared to be the nearest approach to the British model that a new country permitted. This was explained by Mr. John Macdonald (afterwards Sir John Macdonald, the Prime

Minister) during the Confederation Debates.[1] "Nomination by the Crown is of course the system which is most in accordance with the British Constitution. We resolved that the constitution of the Upper House should be in accordance with the British system as nearly as circumstances would allow. An hereditary Upper Chamber is impracticable in this young country. Here we have none of the elements for the foundation of a landed aristocracy—no men of large territorial positions—no class separated from the mass of the people. . . . The only mode of adapting the English system to the Upper House is by conferring the power of appointment on the Crown, as the English peers are appointed, but that the appointments should be for life." In order to ensure the selection of men of substance, Senators must possess land worth four thousand dollars in the province for which they sit, and their real and personal property over and above their debts, must be worth the same amount.[2] They must be thirty years of age.[3] Members of both Chambers are paid a salary.

The Confederation Debates make clear the

[1] *Confederation Debates*, p. 35.
[2] British North America Act, 1867, s. 23.
[3] *Idem.*

theory on which the Senate was based.[1] It was to consist of men of property, of mature years, nominated for their personal eminence and judicial temper and able to reach their decisions without being the creatures of outside influence, for they would hold their seats for life. The body thus created was made one of the strongest Second Chambers in the world, stronger than the House of Lords, for the threat of "swamping" which overcame the resistance of the British peers in 1832 and 1911 was, in the case of the Canadian Senate, so restricted as to be in practice inoperative.

Such were the expectations upon which the Senate was based. The results have been very different. The Governor-General, in making nomination, acts according to the accepted constitutional doctrine upon the advice of the Prime Minister. Any hope that the Prime Minister would rise superior to partisan consideration in making recommendations to the Senate took no account of the realities of political life. The Senate has, by law, a great power, and the Prime Minister who has won the support of the country on a certain policy cannot legitimately be expected to place in the Senate men

[1] See the speeches of Mr. Campbell, p. 24; and of Mr. John A. Macdonald, p. 36.

who will attempt to thwart the measures which he was returned to carry through. The result has been that the practice rapidly developed, by which the Prime Minister recommended none but his own supporters for the Senate.[1]

The first Senate in 1867 was drawn fairly evenly from both the Conservative and the Liberal parties. But under the Conservative Government, as places became vacant, they were filled predominantly by Conservative supporters, so that when Mr. Alexander Mackenzie came into office six years later he found only a handful of Liberals to support him in the Senate. Sir John Macdonald, and Sir Wilfrid Laurier, who between them shared the Premiership for two generations, always regarded the Senate as a preserve for their supporters.[2] Sir

[1] Even under the nominated Senate which preceded the Confederation this inevitable tendency had manifested itself. During the period that the Conservatives were in power, from 1841 to 1848, they nominated 28 Conservatives and 14 Reformers to the Legislative Council (*Confederation Debates*, p. 238).

We find Sir E. P. Taché complaining in 1867: "What was the spirit which actuated the appointments to the Council from 1841 to 1848? It was a spirit of partisanship; and where there is partisanship there can be no justice" (*Confederation Debates*, p. 238).

[2] For list of the Senators appointed since 1867, see the Appendix to Ross's *Senate in Canada*.

John Macdonald appointed one hundred and seventeen members to the Senate, of whom only one appears to have been a political appointment.[1] Sir Wilfrid Laurier made eighty-one appointments, of whom all were his own supporters, and frankly acknowledged the motives. "I have heard it said, 'Why does not the Governor select Senators from the different political parties?' I have only to say that the Government is composed of men who are very human."[2] There is now a degree of pathos in the speeches made during the Confederation

[1] "Of the seventy-six Senators in Canada, all but nine have now been nominated by a single party leader, who has exercised his power for a party purpose, if for no narrower object. . . . Money spent for the party on election contests, especially when he most needs support against the moral sentiment of the public, is believed to be the surest title to a seat in the Canadian House of Lords. If ever there is a show of an impartial appointment it is illusory. . . . The Prime Minister treats the Governor-General as a perfect cipher in regard to the appointments, and looks upon the patronage as entirely his own. Propose that a party leader shall in his own name nominate one branch of the Legislature and you will be met with a shout of indignation; but, under the name of the Crown, a Prime Minister is allowed to nominate a branch of the Legislature without a protest of any sort. Such is the use of fiction" (Goldwin Smith's *Canada*, p. 168; written in 1891 during the Macdonald Administration).

[2] *Canadian House of Commons Debates*, January 30, 1911, p. 2715.

Debates predicting that nomination for life would create an Olympian assembly, that would rise superior to factious considerations. The actual result has been to produce a Chamber where a body of very elderly politicians [1] enjoy a pension for the remainder of their lives at the public expense in return for faithful party services.

The Record of the Senate.

This system has produced many peculiar results which become evident if we make a general survey of the work of the Senate since the Confederation in 1867. Between 1867 and 1913 5,871 Bills were sent up from the House of Commons to the Senate. The Senate rejected in all 113 of these Bills and amended 1,246.[2] Most of these, however, were Bills of little importance introduced by private members and involving no party issues. The record of the Senate as a Second Chamber exercising its full powers is found by examining its actions in Government measures of major importance where party feeling was aroused.

[1] An analysis of the age of Senators made in 1912, showed that in that year more than half were over seventy years of age.

[2] Senate Return for 1908, brought down to 1913 in Ross's *Senate of Canada*, p. 76.

The following were the chief causes of disagreement between the two Houses during the half-century from the Confederation to the Great War.

The Nainamo Esquimalt Railway.

British Columbia entered the Union in 1871. The chief inducement which was held out to her to persuade her to take this step was a Treaty by which Canada undertook to secure, within two years of the date of the Union, the simultaneous commencement at either end of a railway which was to connect the sea-board of British Columbia with the railway system of the Dominion. This railway was to be completed within ten years from the date of union in 1871. Mr. Alexander Mackenzie came into office in 1873. By this time it had become clear that the engineering difficulties presented by the Rocky mountains were so great that the Dominion had pledged herself to an impossibility.[1] A fierce altercation ensued between the Dominion Government and British Columbia, accompanied by threats of secession on the part of the province.[2] A settlement—the " Carnarvon Terms "

[1] Buckingham and Ross: *Alexander Mackenzie; his Life and Times*, c. xxv.

[2] See *Canadian Sessional Papers*, 1876, vol. xviii, No. 41, for the correspondence between the two Governments.

—was finally reached under the auspices of Lord Carnarvon. The railway was to be completed within sixteen years from 1874, and a railway from Esquimalt to Nainamo was to be constructed immediately. The Bill containing the settlement was carried through the House of Commons but rejected in the Senate by two votes.[1]

The case of Lieutenant-Governor Luc Letellier.

In Canada, the Lieutenant-Governors of the provinces are appointed, like the Senators, by the Governor-General on the advice of the Prime Minister. The results that have followed from this system among Senators have been repeated among Lieutenant-Governors. They are political partisans who receive their appointments in return for party support. In 1876 a vacancy occurred in the Lieutenant-Governorship of Quebec, and Mr. Alexander Mackenzie recommended the appointment of M. Luc Letellier de St. Just, who had been known for years as an almost fanatical supporter of his party. But the Government in Quebec was fiercely

[1] An account of this dispute is given in Lord Dufferin's speech at Victoria on September 16, 1876. See *Canada under the Administration of the Earl of Dufferin*, by George Stewart.

Conservative, and after a series of quarrels between it and M. Luc Letellier, the Lieutenant-Governor finally carried out a *coup d'état* by dismissing the Cabinet.[1] The result of this action was that the local dissensions of Quebec blazed up into a national issue which filled Canadian politics for the next year. The conflict was fought upon strictly party lines. The Conservative leader, Sir John Macdonald, moved a motion in Parliament that the action of the Lieutenant-Governor was "unwise and subversive" of the position accorded to the advisors of the Crown since the concession of the principle of responsible government to the British North American Colonies.[2] The motion was defeated by 112 votes to 70. In the Senate, however, a similar motion was carried by 37 votes to 20. When Sir John Macdonald returned to power in 1879, he made this resolution of the Senate one of the reasons for demanding the dismissal of M. Luc Letellier,[3] a request which the Governor-General only carried out after the advocates of the two parties to the dispute had visited England, and his own wishes had been over-

[1] Buckingham and Ross: *Alexander Mackenzie; His Life and Times*, pp. 474, 494.

[2] Canadian House of Commons Debate, April 11, 1878.

[3] Canadian House of Commons Debate, April 3, 1879.

ridden by instructions from the Colonial Secretary.[1]

The Yukon Railway.

In 1898 Sir Wilfrid Laurier's Administration carried a Bill through the House of Commons for the building of a railway from Atlin to Dawson. The object of the proposal was to give Canada access to the Klondike without passing through American territory. The line was to be built by a contracting firm and they were to be given a grant of land in Yukon, of twenty-five thousand acres to every mile of railways built. The most roseate ideas were abroad of the wealth of the Yukon, which has since been found to be exaggerated, and the Senate took the view that the grant of land was excessive and rejected the Bill.[2] Sir Wilfrid Laurier believed that, had the railway been constructed Canada would never have been defeated over the question of the Alaskan boundary, and to the end of his life continued to reproach the Senate for their act.

"If ever there was a mistake committed by the Senate of Canada, it was when they rejected that Bill, which,

[1] See Collins' *Canada under the Administration of Lord Lorne*, pp. 56–100.

[2] Shelton's *Life and Letters of Sir Wilfrid Laurier*, vol. ii, p. 49.

had it been passed, would have afforded Canada access to the Yukon, which we have not now, except through passing through American Territory. And what did they reject the Bill for? They rejected it because it was supposed at that time that the Yukon was covered with gold, and that we were paying an enormous price for the railway, whereas it has turned out that had the bargain been made the railway would have been built on the best terms available and better terms than ever again will be obtained." [1]

The Naval Bill of 1913.

The most widely known of all the disagreements between the two Houses arose from the rejection by the Senate of the Naval Aid Bill of 1913, an act which had important effects upon the naval policy of the United Kingdom. The dispute arose out of the cleavage of opinion upon the question of whether the Canadian share of naval defence should take the form of a local Canadian Navy or of a monetary contribution to the expense of the Imperial Navy. This problem has faced every Dominion since, at the Colonial Conference of 1902, the British Admiralty expounded the doctrine of "a single Navy under one control" and took its stand for the principle of contribution.[2] Canada, alone at that time, resisted the doctrine upon the ground that, "the acceptance of the proposals

[1] Canadian House of Commons Debate, January 30, 1911.

[2] Report of Colonial Conference of 1902, Cd. 1299.

would entail an important departure from the principle of self-government." [1] This view was for some years accepted by both the Liberal and Conservative parties in Canada. After, however, Mr. Borden's return to power at the head of a Conservative administration in 1911, he visited England to discuss the whole question afresh with the Admiralty, and returned to Canada willing to accept the Admiralty doctrine.[2] At the close of 1912 he introduced a Bill to appropriate 35,000,000 dollars for the construction in the United Kingdom of three capital ships "to be placed at the disposal of Her Majesty for the common defence of the Empire." [3] An amendment expressing the view of the Liberal Party was moved by Sir Wilfrid Laurier. It accepted the doctrine that an immediate policy of naval defence was necessary, but asserted that the means of carrying it out was by ships

[1] Report of Colonial Conference 1902, Cd. 1299, Appendix vi.

[2] It is not clear that Sir Robert Borden ever fully accepted the Admiralty view. The Admiralty urged that the danger of war with Germany would be diminished by such an act by Canada, and Sir Robert Borden acquiesced rather as an immediate necessity than a permanent policy.

[3] House of Commons of Canada, Bill 21, Second session, 1912–13.

" owned, managed, and maintained by Canada, to be as soon as possible constructed in Canada." [1] The Bill was carried through the House of Commons by 101 votes to 68. When, however, it reached the Senate a hostile amendment was carried to the second reading and the Bill consequently was defeated.[2] The final result of the whole history was, that when the War broke out, Canada, with the exception of possessing two small vessels—the *Niobe* and the *Rainbow* —had made no effective contribution of either kind to naval defence.[3] The importance of its action towards the Naval Aid Bill overshadowed all other activities of the Senate during the two years preceding the Great War. But in other directions also it showed a sudden emergence from the torpor of years. The chief examples of this awakening must be included in our survey.

Further Examples.

In 1912, the new Administration under Sir Robert Borden carried a Bill through the House of Commons to create a Tariff Commission,

[1] See Canadian Year Book of 1912.

[2] Senate Debates, May 29, 1913.

[3] A full summary of the discussion is contained in the *Canadian Annual Review*, 1912, pp. 69–70; and for 1913, pp. 139–171.

whose task should be to collect the facts and statistics which the Government would need in order to frame a Tariff Law. The Liberal Party opposed the Bill on the ground that the Commissioners would be a body of partisans.[1] Sir Wilfrid Laurier supported this view and contended that the task of the Commission would be that " of preparing a brief for the Minister and would do nothing to simplify the collecting of information."[2] The Bill was carried through the House of Commons, but the Senate introduced an amendment that the Lower House would not accept and the Bill fell to the ground.

The Minister of Railways introduced a Bill in 1912 to encourage and assist the improvement of highways by subsidies to the provincial Governments of 1,000,000 dollars. The Liberal Opposition declared that the purpose of the Bill was to provide " a huge fund for corruption,"[3] and moved amendments to provide that

[1] " Their qualification will be that they shall be loyal subjects and followers of the Right Hon. Gentleman, who is now Prime Minister of Canada. They are to be Conservatives first, last, and all the time, and if they are they have also got to be Protectionists and High Protectionists." Mr. Hugh Guthrie's Speech. See the *Canadian Annual Review*, 1912, p. 239.

[2] *Canadian Annual Review*, 1912, p. 230.

[3] Sir Richard Cartwright in the Senate, March 18, 1912.

the subsidies should be distributed between the different provinces, not by a separate arrangement with each, but strictly upon the basis of population. The Bill passed the House of Commons by 79 votes to 50. In the Senate an amendment was carried, which was identical with the hostile amendment moved in the House of Commons by Sir Wilfrid Laurier and rejected. The Government refused to accept the amendment and the Bill accordingly failed to pass.[1] Practically the same series of events were repeated the next year.[2]

In 1912 the Government introduced a Bill to give a subsidy of 2,000,000 dollars to the Temiskaming Ontario Railway. The Liberal Party opposed the Bill upon the ground that this railway was owned by the Ontario Government and was not, therefore, under Dominion jurisdiction. They were defeated in the House of Commons but the Senate rejected the Bill upon its third Reading by 21 votes to 8. The voting in both Houses was on party lines and it was freely asserted that the opposition to the Bill was due to the fact that Ontario was the centre of Conservative strength.[3]

[1] *Canadian Annual Review*, 1912, pp. 231–233.
[2] *Canadian Annual Review*, 1913, pp. 257–259.
[3] *Canadian Annual Review*, 1912, pp. 233–235.

In 1913 the Government introduced a Bill to authorize the Minister of Railways, with the approval of the Governor in Council, to construct within certain provinces, lines of railway not exceeding 25 miles, and to purchase lines not exceeding 200 miles. The Bill passed the Commons but the Senate introduced an amendment that " every such lease of contract or purchase shall be laid before Parliament for ratification." This amendment was supported by the Liberal Opposition in the Lower House although they had not opposed the original passage of the Bill. The Government declared that the amendment destroyed the whole substance of the Bill and refused to accept it. The Bill accordingly failed to pass.[1]

The Verdict of Canadian Experience.

This survey reveals the place that the Senate has filled for the last half-century. It has freely amended or rejected the minor Bills of private members, has from time to time refused Government measures, but in the case of a legislation involving party considerations, it has, for most of its history, given no evidence of

[1] *Canadian Annual Review*, 1913, pp. 256, 257.

life. From 1878 to 1896, and from about 1900 to 1912 it made no effort to play an effective part in Government legislation. The reason was that these two periods represented the uninterrupted lease of power that was enjoyed first by Sir John Macdonald and his Conservative successors, and then by Sir Wilfrid Laurier. Under the system of nomination, the Senate contained, in both cases, a continually increasing number of the nominees of the Prime Minister, and in all important cases where party interests were concerned, registered his legislation with complete loyalty. The curious result has been that, while Canada according to its constitution has a Second Chamber with powers greater than those of the House of Lords, it has, in practice, lived for most of the last half-century under a virtually single Chamber Government. "The Senate neither initiates nor controls important legislation. After meeting for the session it adjourns to wait for the arrival of Bills from the Commons. About once in a session, it is allowed to reject or amend some measure of secondary importance by showing that it lives. At the end of the session the measures passed in the Lower House are hurried through the Upper House with hardly time enough for

deliberation to save the semblance of respect for its authority." [1]

It is evident from the absence of criticism of the Senate during these periods that if it had always maintained this strictly subordinate function very little objection to it would have been raised. The reason for the attacks upon it are due to the second feature which our survey reveals. It suddenly awakes for a time to active life, and the motives under which it acts at these intervals can be seen by observing the dates at which it asserts itself. They are all years which mark the early period of a new administration. When a party which has been in opposition for a long time comes into power, it suddenly realises that Canada possesses a powerful Second Chamber. But it is a Second Chamber of an indefensible character. It consists of a majority, which only the hand of death can remove, bound to the defeated Prime Minister by all the ties of party feeling and personal gratitude. Such a Chamber can make no claims to be a means of securing impartial decisions

[1] Goldwin Smith's *Canada and the Canadian Question*, p. 66, written in 1891 after the Macdonald Administration had been in office thirteen years.

The Liberal Government returned in 1921 has further lowered the position of the Senate by deciding that as a rule only Ministers without portfolio should sit there.

on vexed questions. It is merely a party instrument by which the party that has been defeated at the polls still succeeds for some years in securing an advantage over its opponents. Decisions, whether right or wrong, reached under such motives as these cannot command respect. The result is that nobody in Canada now seriously defends the present composition of the Senate. For long periods the country is left with practically no Second Chamber, and for the remaining periods it has a Second Chamber which acts on the wrong principle and from the wrong motives. The experience of Canada, therefore, teaches us that life nomination is not a system for other countries to imitate.

Senate Reform.

In order to complete our survey we need to consider the prospect of a solution of the problem in Canada. This can best be seen by an examination of the proposals made by reformers of the Senate in that country for an alternative to the existing system.

The question was first raised in 1874 by Mr. David Mills, who moved a resolution in the House of Commons affirming that "the constitution of the Senate ought to be so amended as to confer upon each province the power of

selecting its own Senators, and of defining the mode of their election." [1] Although the debate on the resolution was adjourned without any action, the discussion of the subject during this session and the next, made it clear that Mr. Mills's proposal that the Senators should be appointed by the different provinces, represented the general opinion of the House.[2] The Liberal Party included the reform of the Senate in their platform of 1893, but, although they were subsequently in power for fifteen years, they made no effort to carry it out. For thirty years after Mr. David Mills's motion there was no full-dress discussion of the subject in the House of Commons, but its revival on a motion by Mr. McIntyre on April 30, 1906, has been followed in subsequent years by a series of debates [3] in both Chambers.

Sir Richard Scott, who had been Liberal leader in the Senate, outlined a scheme before that assembly in 1909, of which the chief features were: (1) That an elective element should be introduced applying approximately to two-thirds of the members of Senators; (2) that the system

[1] April 12, 1874.

[2] See Buckingham and Ross's *Alexander Mackenzie, His Life and Times*, pp. 388–91.

[3] *Canadian Annual Review*, 1908, pp. 34 *seq.*

of nomination should be retained for the remainder of the Senate; (3) that the term of office should be reduced from life, to seven years. The proposal for an elective Senate has also been strongly supported for many years by Sir Richard Cartwright, another Liberal leader in the Upper Chamber.[1] On the other hand, Sir Wilfrid Laurier, the Liberal Prime Minister, affirmed his emphatic opposition to an elective Senate and declared that such a suggestion had no public support.[2] In 1911 he sketched a very tentative plan of his own, in which, without much enthusiasm, he reverted to the original proposal by Mr. David Mills, and suggested as a possible solution that: (1) a proportion of the Senators should be elected by the provincial legislatures; (2) the remainder should continue to be nominated on the existing system; (3) the term of office should be reduced to twelve or fifteen years.[3]

But Mr. G. E. Foster, replying to Sir Wilfrid Laurier from the Conservative opposition, pointed

[1] *Senate Debates*, 1911, pp. 252 *seq.*

[2] "We think that we have elections enough at the present time. So far as I can see there is no one within reach of my voice who would favour an elective Senate" (*Canadian House of Commons Debates*, January 30, 1911, p. 2714).

[3] *Canadian House of Commons Debates*, January 30, 1911, p. 2714.

out that in the United States the Senators had been elected by the State Legislatures, and that "to-day the revulsion of feeling is absolutely against that method of election." [1] He also argued that the provincial parliaments were not elected to deal with national issues, and that it would be a mistake to "bedevil the legislative assemblies by putting this strife and contention in their midst." [2] His alternative was that the bulk of the Senate should be elected by a popular vote over large constituencies. Finally, Mr. Lancaster in his annual resolutions upon the subject in 1909, 1910, 1911, has insisted that the only solution of the problem is the complete abolition of the Senate.

It is strange that in the numerous debates

[1] Since these observations were made an amendment to the United States Constitution has been passed, vesting the election of Senators in the people instead of in the legislature of each State (Article XVII of the United States Constitution, proclaimed May 31, 1913).

[2] *Canadian House of Commons Debates*, January 30, 1911, pp. 2728 *seq.*

This was the view always taken by Sir John Macdonald. "The proposal that the provincial legislatures, whose members are elected for purely local purposes, should choose the Senate to legislate on matters of general concern, was also objectionable, being opposed to the spirit of the constitution, which confined the local assemblies to a strictly limited sphere of action" (Sir Joseph Pope's *Life of Sir John Macdonald*, vol. ii, p. 235).

on the subject no reference has been made to any of the expedients that have been adopted by the other dominions, or to the experience of Canada herself before the Confederation. The most important fact, however, that the discussion reveals is, that although the existing constitution of the Senate is generally condemned, there is no agreement on the best means for reforming it, either between opposing parties or among different members of the same party.[1] This is important because Canada is confronted by a special difficulty in the way of any proposals for sweeping alterations, either in the Senate or in any other portion of the constitution.

Sir John Macdonald pointed out in the debates of 1867 that the proposed confederation was "in the nature of a treaty" between the different provinces, and it follows that the treaty, after it had been made, cannot be fundamentally altered without the consent of the provinces that entered it. This objection was raised in 1875 during the early debates upon the reform of the Senate[2] and has been maintained in the later discussions.

[1] See Mr. Lancaster's remarks, *House of Commons Debates*, January 30, 1911, pp. 2689 *seq.*

[2] "Would the Hon. Member contend in this House that the Imperial Parliament would have a constitutional

No part of the Canadian constitution, with a few inconsiderable exceptions, can be amended by the Canadian Parliament. An act of the Imperial Parliament is required for this purpose, but in the case both of the provincial subsidies in 1907 and the change in the number of Senators in 1915 the Imperial Government made it clear that it would not feel justified in introducing legislation unless there was practically complete agreement.[1]

The reform of the Senate has never yet become a sufficiently burning issue for any such consensus of opinion to be created. It has been assailed at certain spasmodic intervals, and then for long periods its existence has appeared to be forgotten. But the reason for this has been due to causes which have now probably ceased to operate. A peculiar feature of the political life of Canada during the last half century,

right to pass the British North America Act at all, without the consent of the various provinces interested therein? They would not. And having passed the Act with the consent of the provinces, could it be altered by the Imperial Parliament without the same consent? It would not only be a violation of the constitution, but also of the distinctive agreement between the Provinces" (Mr. Palmer: *Canadian House of Commons Debates*, March 1, 1875, p. 606).

[1] See Ross's *The Senate in Canada*, pp. 39 *seq.* See also Keith's *Imperial Unity and the Dominions*, pp. 390, 394.

since the Confederation, has been the long lease of uninterrupted power enjoyed by each party in turn. The curious result, as has been explained, is that Canada has, during the bulk of this time, lived under a virtual Single Chamber government. It is a striking fact that during these periods the country has apparently been satisfied, and demands for the reform of the Senate have ceased. This indicates that Canada is quite satisfied with the Senate so long as it acts as a small revisory body which deals freely with private members' Bills, but makes no attempt to contest the main principle of the legislation of the Government. It has been during the intervals during which the Senate has acted as a Second Chamber, of the wrong kind, that hostile opinion has gathered against it. These intervals occur during the early years of an administration and have been rare under the extraordinarily long-lived administrations of the last half century. But this peculiar phase of Canadian politics is unlikely to continue now that the old lines of party cleavage have broken down, and a third party has suddenly emerged into unexpected strength.[1]

[1] At the beginning of the war the Conservative Party was in office. In 1917 it formed a coalition with the Liberals, into which, however, a large section of the latter

This result, together with the new relationship between parties, indicates that the Governments in Canada are not likely in future to be longer lived than those in other countries. If Canada enters upon this phase her Governments will find themselves continually harassed by a Second Chamber of an indefensible type and the problem will become acute.

refused to enter. Meanwhile, the Progressive Party, representing the farming interests, arose to strength independently of both the older parties. The result of the General Election at the end of 1921 was as follows:

Liberals	116 seats with	1,246,000	votes.
Progressives	65 seats with	769,000	votes.
Conservatives	50 seats with	971,500	votes.
Labour and Independents	4 seats.		

CHAPTER V

THE AUSTRALIAN SENATE

THE references in this chapter need to be explained by a summary of the chief stages in the discussions which led to the federation of Australia. The scheme had been discussed for at least fifty years before it was achieved, and in 1885 there was established a Federal Council, a small important body without executive power or revenue. But the modern movement dates from Sir Henry Parkes' famous Tenterfield declaration of October 24, 1889. In this speech he demanded "that the people ought to set about creating a great national Government for all Australia," and called upon them "to appoint a convention of leading men from all the Colonies who will fully represent the feelings of the different Parliaments."[1] This was followed by a conference on February 6, 1890, at which the six Australian Colonies together with New Zealand were represented by thirteen delegates.[2] Their resolutions were unanimous. They decided that a union of the Colonies would be justified and that a convention of members elected by the legislature of the Colonies should be summoned to devise a scheme. This convention opened at

[1] *Federal Government of Australia*, speeches by Sir Henry Parkes, pp. 1–6.

[2] New Zealand dropped out of the scheme at a later stage.

Sydney on March 1, 1891. After certain resolutions had been passed it set up a number of committees, of which the most important was the Constitutional Committee. This committee entrusted the greater part of the work of drawing up a Constitution to a sub-committee consisting of Sir Samuel Griffiths, Mr. Kingston, Mr. Barton, and Mr. Inglis Clark. The remarkable draft Bill which they produced, although altered in many particulars, remains the foundation of the Commonwealth Constitution of to-day, and was adopted by the convention with only three important changes.

This achievement was succeeded by six years of inaction. The convention had decided to refer the Bill to the Parliaments of the several Colonies, but in these bodies the Bill made so little progress that the movement appeared to have died out. But meanwhile a popular movement had been growing in strength. The Australian Natives Association took the matter up and a series of Federation Leagues was formed throughout the continent. Dr. John Quick devised a means of acting over the heads of the State Parliaments. He suggested that there should be a National Convention directly elected by the people themselves for reducing the Bill of 1891 to its final shape, and that when the Bill left the convention it should be submitted to a referendum of the people of each Colony. All that was asked from the State Parliaments was that they should pass Enabling Bills to allow this scheme to be carried through. They were persuaded to do this, and the convention, consisting of sixty men, ten from each of the six States of Australia, met at Adelaide in March 1897. A new draft Bill was prepared by a new committee, but its framework and foundation were the Bill of 1891. After sitting for a month at Adelaide the convention adjourned in order that its draft Constitution might be considered by the State Parliaments. Their suggestions were considered by a further session which met in Sydney in Sep-

tember 1897, and lasted for three weeks. Finally, at its last sitting in Melbourne in January 1898, the convention spent nearly two months in putting the Constitution into its final shape. It still needed to be submitted to a referendum in each of the Colonies. It was carried without difficulty in Victoria, South Australia and Tasmania. Before New South Wales would assent, two referenda had to be held, the Bill had to be further amended and a second set of referenda had in consequence to be held in the Colonies that had already voted. Queensland came in two months after New South Wales, and West Australia followed after the lapse of another year. The Constitution had still to be passed through the British Parliament as an Imperial Act. There was a sharp struggle between Mr. Chamberlain and the delegates who came to London from Australia, over the proposal in Clause 24, by which the High Court of Australia was made the final court of appeal on all legal questions involving the interpretation of the Constitution. A compromise was reached by which the High Court was empowered to permit such an appeal on its own certificate, and with one other minor amendment the Bill was passed. The first Parliament of the new Australian Commonwealth was opened on May 9, 1901.

The Parliament of Australia includes two Chambers—the House of Representatives and the Senate. The House of Representatives—the lower House—contained at its inception 75 members, distributed between the different States in proportion to population. This number can be altered, but it is specifically laid down in the Constitution that the number shall always be "as nearly as possible twice the number of the

Senators," a provision of which the significance will be apparent later.[1] The House is elected by adult suffrage,[2] for a life of three years.[3] The lower House in Australia thus follows the usual lines of democratic Parliaments.

In the creation of the Upper House, however, the framers of the Constitution were thrown back largely upon their own inventiveness and produced one of the most interesting Second Chambers in existence. The Australian Commonwealth is a comparatively late addition to the governments of the world and is the product of advanced democratic doctrines. Such devices as the nominated Senate of Canada, representing the methods of the previous half century, were therefore quite out of place, and the Senate had to be as democratic as the Lower House. But this raised the problem of how to secure a Second Chamber as democratic as the first and yet not a duplicate. The answer was given by combining the solution of this question with that of a second—how to allay the apprehensions of the smaller states that federalism would leave

[1] Section 24, Commonwealth of Australia Constitution Act, 1890.

[2] Commonwealth Franchise Act, 1902, Section 30 of the Constitution.

[3] Section 28 of the Constitution.

them at the mercy of New South Wales and Victoria, which contained nearly seventy-five per cent. of the population of the continent.[1] All states were given, on the plan followed in the United States, equal representation in the Senate, which was thus intended to become the special security of the group of less populous states. Each state, therefore, sends six members to the Senate, which is thus a Chamber of thirty-six members.

Up to this point the Australian constitution follows the United States, but in its next feature it led the way to the older federation. The original draft Bill of 1891 drawn up during the first Sydney Convention proposed that Senators should be elected by the Parliaments of the several States.[2] As soon as the Convention reassembled to discuss the draft Bill this decision was challenged by Mr. Kingston, who from the beginning asserted his belief in a Senate based on direct election by the people,[3] and moved an

[1] The total white population of Australia when the discussions on federation began in 1890, was 3,150,000. Of this number Victoria and New South Wales contained 2,250,000, and the remaining four Colonies 900,000.

[2] Quick and Garran's *Annotated Constitution of the Australian Commonwealth*, p. 133.

[3] See his speech in the *Sydney Convention Debates*, April 6, 1891, p. 735.

amendment to allow the legislature of each State to decide for itself the method by which the Senate should be elected.[1] The amendment was defeated by 34 votes to 6, but Mr. Kingston's views steadily won acceptance in the succeeding years. They were strongly supported by the Labour Party, who foresaw that the Australian State Legislatures with their undemocratic Second Chambers would turn the Senate into a Conservative stronghold. The unofficial but very important "People's Federal Convention" held at Bathurst in 1896 decided in favour of direct election,[2] and when the Adelaide Convention met in 1897, the draft Bill that it produced as a basis for discussion abandoned the proposal of 1891, and provided that the Senate should be elected directly by the people of each state as one electorate.[3] This proposal was accepted without difficulty and Australia thus rejected the plan which had been followed in the United States. Her choice has been justified by the subsequent action of the United States itself, which, thirteen years later, finding by experience

[1] *Sydney Convention Debates*, April 1, 1891, p. 590.

[2] Quick and Garren: *Annotated Constitution of the Australian Commonwealth*, pp. 163, 168.

[3] By the Commonwealth Franchise Act of 1902, the franchise for the Senate and the House of Representatives has been based upon the same qualifications.

that the election of Senators by the State Legislatures threw the choice into the hands of small groups of party managers and was one of the chief sources of corruption, followed the Australian example by providing for direct election.[1]

One half of the Senators retire every three years.[2] A feature of very special importance which, as will be seen, has had the most unexpected effects, is that in electing the three members at each period of retirement, the election is held by "general ticket" over the whole state as a single constituency.[3]

Powers of the Senate.

In dealing with the vital question of what were to be the powers which the Senate was to exercise, the framers of the federation abandoned the simple expedient of the United States and Canada of making no provision for the solution of deadlocks except the death of the measure. Being thus driven on to their own resources, they devised a scheme, which amounted to a new contribution to the experiments on this

[1] Section 17, United States Constitution, proclaimed May 31, 1913.

[2] Section 13 of the Constitution.

[3] Section 7 of the Constitution.

problem. Leaving money Bills for later examination, the following are the chief provisions for solving a situation in which the Senate rejects a Bill passed by the House of Representatives or introduces amendments to which the Lower House will not agree.[1] The House of Representatives may, in such a case, pass the Bill again after a period of three months. If the Senate again rejects it or insists upon unacceptable amendments, the Governor-General may then dissolve both Houses simultaneously, so that the General Election which follows would be largely in the nature of a referendum on the disputed Bill. The probabilities are, that as a result of the election the two newly elected Houses would agree. But this is not by any means certain in consequence not only of the equality of State representation in the Senate, but of the curious results, to be described later, of the system of making each State a single large constituency for the Senate and breaking it up into a number of small constituencies for the House of Representatives. If then, after the election, the House of Representatives again carries the Bill, and it again fails to pass the Senate, the situation has been reached in which the final solution is applied. The two houses

[1] Section 57 of the Constitution.

enter upon a joint sitting, in which the majority decide the issue, and in which the special provision that the House of Representatives shall have double the numbers of the Senate gives it double the strength. The powers of the Australian Senate, therefore, are based upon a combination of the two devices of the Double Dissolution and the Joint Sitting. The latter in particular is one of the most fertile of the expedients used to solve deadlocks between the two Chambers, and we shall meet it frequently in most of the other constitutions that we shall discuss.

This method of solving deadlocks has, in practice, only been brought into operation once, but, owing to recent developments, it is likely to be more frequently exercised in the future. Until 1913 the understanding on which Governor-Generals had acted was that a Double Dissolution was only to be used as a last resort, although a Prime Minister might advise such a step in the case of Bills for which there was an undoubted public demand, and where no alternative government was possible.[1] Up to 1913 no Double Dissolution had occurred, although the Governor-General had on three occasions been

[1] Keith's *Imperial Unity and the Dominions*, p. 108. See statement made by Mr. W. M. Hughes.

asked for one by the Prime Minister of the time.[1] In 1913 Mr. Cook and the Liberal Party found themselves with a majority of one—the Speaker's casting vote—in the House of Representatives, and a minority of twenty-two in the Senate. They decided to attempt to secure a majority in both Houses by forcing a premature dissolution. For this purpose they introduced two Bills of no great importance in themselves, which it was certain the Senate would reject, so that a pretext would be given for asking the Governor-General for a double dissolution. The case for such a request was artificially created, but the new Governor-General (Sir Ronald Munro Ferguson) unexpectedly assented, and in doing so established the new convention that in this, as in other subjects, the Governor-General acts on strictly ministerial advice.[2] This decision introduces a new complexity into the Australian scheme of government, for if circumstances arise in which the Prime Ministers continue to advise a double dissolution as frequently as

[1] By Mr. Watson, the Labour Prime Minister in 1904, Sir George Reid, the Liberal Prime Minister in 1905, and Mr. Fisher, the Labour Prime Minister in 1909.

[2] For a discussion of his action see the *Round Table*, September 1914, pp. 733 *seq.*, and Keith's *Imperial Unity and the Dominions*, pp. 106 *seq.*

they did before the war, it will take place on an average every three or four years, and continually throw out of order the working of the normal scheme of triennial elections.

The Financial Powers of the Senate.

The first suggestion arising from the experience of the Australian Senate is that it is not easy to exclude a fully democratic Chamber from control over finance. This was made very clear by the lengthy discussions upon the financial powers of the Senate, which occupied more time than any other subject in the various Convention Debates. Sir Samuel Griffith, the chief architect of the constitution claimed, at an early stage of the Sydney Convention of 1891, that the Senate should have as full power to amend money Bills as the House of Representatives.[1] The opposing view was led by Sir Henry Parkes, who held to the doctrine, generally accepted in constitutions following the British model, that the existence of two Chambers with co-ordinate powers over finance is inconsistent with Cabinet

[1] *Sydney Convention Debates*, March 4, 1891, p. 32. Sir Samuel Griffiths contemplated the abandonment of the British Cabinet system for the American system of an executive independent of Parliament.

Government.[1] This was the most fiercely contested point raised throughout the ten years of discussion. With the exception of a few individual delegates the smaller States, whose representation in the Senate was out of all proportion to their population, claimed coequal powers for the two Houses, while the larger States followed Sir Henry Parkes. On more than one occasion the whole federal scheme seemed in imminent danger of being wrecked by the antagonism between these two opinions,[2] but the delegates, at the first Sydney Convention, decided to pass no resolution on the subject until the possibility of an arrangement had been further explored. The draft Bill drawn up by the committee appointed by the Convention contained the "compromise of 1891," of which the main proposal was that the Senate should have power to reject money Bills, but that in place of the power to amend them, they should have a special power of making "suggestions" by sending requests for amendments to the House of Representatives.[3]

[1] *Sydney Convention Debates*, March 16, 1891, p. 380.

[2] Sydney Convention Debates, March 16 and April 2, 3 and 6, 1891.

[3] This proposal was borrowed from the Constitution of South Australia.

This compromise passed through many vicissitudes. It was met in the Convention by an amendment moved by Mr. Baker, one of the representatives of South Australia, to give the Senate as complete power over money Bills as the House of Representatives, which was finally defeated by 22 to 16.[1] There the subject rested for six years. The draft Bill of the Committee appointed at Adelaide by the Convention in 1897 upset the compromise of 1891 by giving the Senate full power to amend money Bills. When the Bill came before the Convention, Mr. Reid moved an amendment to strike this change out and to revert to the Bill of 1891. This amendment was carried by a majority of two—25 votes to 23—[2] and the " compromise of 1891 " is now part of the Constitution. The whole series of discussions show that a democratic Second Chamber can logically claim power over finance, and that such limitations as have been imposed upon the Australian Senate were only possible because of the fact that the over-representation of the smaller states made it less completely democratic than the Lower House.[3]

[1] Sydney Convention Debates, April 3 and 6.

[2] Adelaide Convention Debates, April 13 and 14, 1897.

[3] See Mr. Reid's argument upon this subject: *Adelaide Convention Debates*, April 13, 1897, p. 484.

Although the powers of the Senate are the product of a compromise they are greater than those of any other Second Chamber in the British Dominions. Bills appropriating revenue or imposing taxation must originate in the House of Representatives. The Senate may reject such Bills, and it was clearly laid down in the debates of the Conventions that this right is to be exercised "not as an antiquated power never to be used, but as a real living power." [1] The Senate may not amend money Bills, but they may at any stage return such Bills to the House of Representatives "requesting by message the revision or amendment of any of the items or provisions therein." [2] They may amend all other Bills, but not so as to increase any proposed charge or burden upon the people. Special sections were introduced to prevent either "tacking" [3] or the device of including all the financial measures of a year in a single Bill which it is impracticable for the Senate to reject.[4]

The Senate's Assertion of its Claims.

The Senate has stood stiffly upon its rights under these sections. In the first session of

[1] Mr. Reid: *Adelaide Convention Debates*, April 13, 1897, p. 485.

[2] Article 50, Constitution. [3] Article 54, Constitution.

[4] Article 55, Constitution.

Parliament in 1901, it used its power of "suggestion" to insist that supply Bills should include the items of expenditure that they had proposed to grant.[1] When this was conceded it successfully claimed that words should be inserted in the title of the Bill and in the Bill itself showing that the grant was made by the Senate as well as by the House of Representatives.[2] In the same session it made an attempt to lay down the doctrine that supply Bills should contain no non-recurrent items of expenditure, but this doctrine is not supported by British practice, and the Senate was compelled to give way.[3] Three years later it successfully protested against the form of the Governor-General's speeches at the opening and prorogation of Parliament. The paragraphs in these speeches referring to estimates and supply were, in accordance with British practice, addressed to "Gentlemen of the House of Representatives." The Senate passed an address to the Governor-General requesting that in framing his speeches "due recognition should be made of the constitutional fact that the providing of revenue

[1] *Parliamentary Debates*, 1901, vol. i, June 12, p. 1101; June 14, pp. 1153 *seq.*, 1174 *seq.*; June 20, pp. 1352 *seq.*

[2] *Ibid.*, vol. ii, June 21, 1901, p. 1471.

[3] *Ibid.*, vol. i, June 20, 1901, pp. 1310 *seq.*

and the grant of supply is the joint act of the Senate and the House of Representatives, and not of the House of Representatives alone," and this practice has been followed since with a slight modification. [1]

The most important questions have arisen over the power to request amendments. The discussions in the Conventions showed that there was a general vagueness as to what was the exact degree of authority which this power gave to the Senate.[2] Sir Samuel Griffith, in his notes on the Draft Federal Constitution framed at Adelaide in 1897, expressed the opinion that the power of "suggestion" was practically equivalent to the power of amendment. "Whether the mode in which the Senate should express its desire for an alteration in money Bills is by an amendment in which they request the concurrence of the House of Representatives as in other cases, or by a suggestion that the desired amendment should be made by the Lower House as its own motion, seems to be a matter of minor importance. A strong Senate will compel attention to its suggestions, a weak Senate will not insist on its amendments."

[1] *Parliamentary Debates*, vol. xv, April 4, 1904, pp. 942 *seq.*

[2] See Mr. Higgins question, *Melbourne Convention Debates*, vol. ii, March 7, 1898, p. 1996.

The experience of the Commonwealth has proved this opinion to be true. On the Customs Tariff Bill of 1902, the Senate sent down a number of requests for amendments, and when some of them were refused, decided to repeat them. This immediately raised the whole problem of the power that the right to make suggestions carried with it, for if they can be indefinitely repeated, they cannot be distinguished from amendments. The government in the House of Representatives was not in a position to fight this issue to the end, for the constitutional question would have been put into the background by the opinion of the members on the fiscal controversy. The Senate proposals were, therefore, taken into consideration, and the latter body clinched its claims by affirming that the action of the House of Representatives was "in compliance with the undoubted constitutional position and rights of the Senate." Practically the same story was repeated on the Customs Tariff Bill of 1903.[1] In the case of non-financial Bills, the right of suggestion may be even more powerful than the right of amendment. During the passage of the Sugar Bounty Bill of 1903, the Senate carried an amendment which it was contended in the House of

[1] Harrison Moore: *Commonwealth of Australia*, p. 148.

Representatives increased a charge on the people and was therefore outside their power.[1] The Senate, therefore, withdrew the amendment and sent the proposal down in the form of a suggestion. This was accepted, and the position which has thus been created is that while the right of amendment on non-financial Bills is strictly curtailed, the right of suggestion has no limits.[2]

The conclusion to which all these events lead is that the Australian Senate furnishes an excellent example of the truth of the opinion of the Bryce Conference that a Second Chamber based upon popular election will not willingly allow itself to be excluded from the realm of finance.

Party Politics and the Senate.

We come now to the crucial question: How far has the Australian Senate fulfilled the chief function assigned to a Second Chamber by withstanding the proposals of the lower House in cases where the will of the people is not clear? The question of whether a Second Chamber can fulfil this purpose depends upon how far it is independent of the party system. If it is a purely party instrument it will only carry out its

[1] *Parliamentary Debates*, July 22, 1903, pp. 2076–78, 2364 *seq.*, 2469 *seq.*

[2] *Ibid.*, 1903, vol. xiv, pp. 1691 *seq.*, 1821 *seq.*, 2076 *seq.*

duties during periods when, by a combination of circumstances, there happens to be in the Lower House a party legislating contrary to the popular will and at the same time in the Upper House a party majority of the opposite political view. The Australian Senate shows rather more independence than the House of Representatives, but it is broadly as much the subject of the party system as the Canadian Second Chamber, a fact which the Labour Party has rendered specially conspicuous by bringing its members in both Houses equally under the control of a common party caucus.

The method of electing the Australian Senate has, in fact, accentuated party majorities within it. The election of Senators by " general ticket " over the whole State as a single constituency means that each state normally returns at each election a solid representation of members of one party, and that the minorities within the State have no representation at all. The result is that the disproportion of parties in the Senate is markedly greater than in the House of Representatives. During the early years of the Commonwealth, this tendency operated in favour of the Labour Party, but the position in late years has been sharply reversed. Labour won no seat in the Senate in 1917, and a single seat

only in 1919, with the consequence that although the Labour Party secured nearly half the votes recorded, it found itself from 1919 to 1922, with one member only out of the thirty-six that the Senate contains. Such results are so indefensible that the abolition of the present system of electing the Senate will certainly be one of the first reforms that will be carried in the Constitutional Convention that is proposed for the near future.

Labour and the Senate.

We come now to a more remarkable result. The usual theory of the Second Chamber is that it will stand as a barrier against attempts on the part of the lower House to hustle socialistic proposals into law. Those who look to a directly elected Second Chamber to perform this duty will find little comfort from the history of the Australian Senate, which was for many years a stronghold of the Labour Party, and became one of the instruments for the passage of some of the most advanced Labour legislation in the world. One of the causes of this unexpected situation is again to be found in the system of election by general ticket over the whole State as one constituency. When constituencies are so large that the candidates cannot make themselves individually well known to the electors,

organisation becomes one of the decisive factors. In Australia the Labour Party has possessed a better organisation than other parties owing to the special circumstances out of which it arose. It is the outcome of the failure of the great maritime strike of 1890, when the Trade Unions, defeated and with exhausted funds, came into politics in order to use the State as a substitute for the broken weapons of the strike.[1] The Labour Party, therefore, has from the beginning been an auxiliary of the Trade Unions and has had their machinery behind it. A party based upon an organisation which exists for other purposes in addition to politics, and can thus draw upon large funds, and a permanent official machinery has an obvious advantage over parties whose organisations have to be maintained for politics alone. These factors are, of course, only some out of many that determine the issue, and the limits to their influence are illustrated by the recent history of the Labour Party in the Senate.

[1] "This is over and above all others our greatest lesson—that our organisation must become a means of education and constitutional power. Already it is half learnt. We have come out of the conflict a united Labour Party. The next general election must yield us the balance of power."—Report of the Labour Defence Committee (which organised the strike).

The Senate and the States.

The next result has still more curiously contradicted the purpose for which the Senate was formed. It was intended, as has been pointed out, to be the guardian of the rights of the States. It was specially constituted so as to give equal representation to all the States, irrespective of their population, and at one stage of the Convention Debates of 1897 it seemed as if it would be named the "States Assembly." [1] In the dispute over its power, on which the whole federation nearly foundered, it was fiercely supported by the smaller States. But the control of Labour in the Senate has led to quite unexpected consequences. Labour desires a strong central government driving through proposals for the establishment of a high minimum standard of life throughout the continent. It has, therefore, stood for increased unification, and has been the party mainly instrumental in urging forward proposals to increase the power of the Commonwealth Government. Its control of the Senate for many years, therefore, had the curious result of converting that body into an instrument for weakening the power of the States.

The fact is that there are two competing

[1] This was the name contained in the draft Bill discussed by the Adelaide session of the Convention in 1897.

sentiments at work in Australia. The State sentiment is powerful, and has shown itself in late years by such manifestations as public meetings in favour of separation in Western Australia, and in the bitter complaints of Tasmania at the failure of the Commonwealth Government to establish a fruit pool during the war.[1] The natural place for the discussion of such grievances is the Senate, but here we come up against the competing sentiment—that of Labour against Capital—which, during the years that the Labour Party controlled the Senate, converted this body into the enemy rather than the protector of the state rights that it was specially created to guard.

Conclusions.

The general conclusion to which this survey leads is that the Australian Senate has not fulfilled either the special functions which were assigned to it in Australia, or the wider purposes of Second Chambers in general. It happens that this is not of importance, as Australia has furnished herself with other means for obtaining the objects which the Senate has failed to secure. By electing the House of Representatives for three years only she secures a Chamber in which

[1] See the *Round Table*, September, 1919.

members are always candidates and cannot move far out of touch with public opinion. A still more powerful influence is the referendum which, whether the two Houses agree or disagree, is necessary before any law amending the constitution can be carried, and in which the measure must secure not only a majority throughout the Commonwealth, but a majority in a clear majority of States.[1] This device, therefore, secures that in all proposals for constitutional amendments both the will of the electors as a whole and the interests of the smaller states are protected. Fifteen referenda have been held since the birth of the Commonwealth, thirteen on amendments to the constitution and two upon conscription during the war. Of these, two have been carried and thirteen lost.[2] The referendum has defeated the proposals of all parties in turn, and made it evident that throughout the range of constitutional issues, a Second Chamber is superfluous.

Constitutional Revision.

A wholesale revision of the Australian constitution in which the fate of the Senate will be involved must sooner or later be undertaken.

[1] Article 128 of the Constitution.

[2] *Commonwealth Parliamentary Handbook*, 1901–1920.

The problems raised by the defeated referenda for the extension of the Commonwealth powers are still unsolved and an increase of the federal authority over the States is ultimately inevitable.[1] The Commonwealth Government after the failure of the referenda, announced that they proposed to summon a Convention of the same type as those out of which the constitution arose, whose findings would be submitted to the people, and then ratified by an Act of the Imperial Parliament.[2] The date of the meeting of the Convention has been twice postponed, but during the election of 1922 the Prime Minister of that date, Mr. Hughes, included the summoning of a Convention in his official statement of his party's policy,[3] and an early meeting of it was anticipated. Since that time the attempt to secure an agreement on a Convention has failed, and the prospect of its assembly is again indefinite.

[1] An account of the referenda is given in a note at the end of the chapter. Amendments in the constitution are needed for other purposes than those contained in the referenda: (*a*) to provide for co-operation between the State and Commonwealth Governments on questions of tax collection and electoral law; and (*b*) to modify the formal legal division between the legislative executive, and judicial powers of the Commonwealth, out of which incessant inconvenience and litigation have arisen.

[2] Keith's *War Government in the Dominions*, p. 311.

[3] Speech at Chatswood, October 23, 1922.

The future of the Senate is bound up with the problem of unification. The proposals of the Labour Party for the revision of the Constitution have always tended towards the unitary system. They have now put forward a policy which would involve the disappearance of federalism and the division of Australia into thirty-one districts administered by Councils acting under powers devolved on them by the Commonwealth Parliament.[1] This unification would be accompanied by the abolition of the Senate and the adoption of Single Chamber government.[2]

The success of their attack upon the Senate will be dependent upon their achievement of unification, since, so long as the federal system remains, the smaller States will insist upon the existence of a Second Chamber where they can have equal representation with New South Wales and Victoria. It seems improbable that the people will accept the unitary system, and the Senate, therefore, is likely to be reformed rather than abolished.

[1] For a discussion of these proposals see the *Round Table*, September, 1919, pp. 798 *seq.*

[2] The Labour Party for each State has for some years demanded the abolition of the State Legislative Councils, and have succeeded in carrying their policy into effect in Queensland. See Cmd. 1629, 1922.

APPENDIX ON THE REFERENDUM IN AUSTRALIA

The working of the referendum is illustrated by its striking effects upon the proposals to enlarge the powers of the Commonwealth Government over the States.

The Labour Party found that their policy was blocked in a number of important directions because uniform action could not be obtained from six separate State Parliaments. They therefore introduced and carried through both Houses a series of proposals for extending the power of the Commonwealth Parliament to legislate in six directions:

1. Trade and Commerce within Australia as a whole, and not merely between the States and with other countries.
2. Corporations, whether Commonwealth, State or foreign.
3. Industries including wages, employment and industrial disputes—without the limitation that the existing Constitution imposes upon the rights of the Commonwealth to deal with such subjects.
4. Industrial disputes arising about a railway belonging to a State.
5. Trusts, combinations and monopolies.
6. The nationalisation of industries which become the subject of a monopoly.[1]

Although modifications in these proposals were made from time to time their main substance remained unaltered throughout the repeated referenda of which they were the subjects.

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[1] The best statement of the arguments for and against these proposals is contained in the official pamphlet, "Amendment of Constitution; Federal Referendums; The Case for and against," issued to the voters in connection with the referendums of May 1913. The arguments on each side were authorised by a majority of the members of Parliament who voted on that side. See also the *Round Table*, May 1911, pp. 329 *seq.*; August 1911, pp. 500 *seq.*; December 1911, pp. 145 *seq.*; June 1913, pp. 537 *seq.*

The first referendum on them was held in April 26, 1911, the proposals to nationalise monopolies being presented in one Bill and the remaining proposals grouped together in a second Bill. Both Bills were overwhelmingly defeated, being rejected not only throughout the Commonwealth but in each State separately, except in Western Australia.[1]

The Labour Party waited for two years. Then, just before term of office of the House of Representatives expired, they passed the Bills once again and submitted them to a second referendum, which was held at the same time as the General Election of May 31, 1913. On this occasion they put each of the six Bills separately, as the previous device of grouping a number of the Bills together had created great resentment amongst those who regarded it as a piece of trickery which prevented the electors voting on each Bill by itself. The previous result was nevertheless repeated, and the six Bills were rejected separately, although the majorities were not so great as in 1911.[2]

Labour lost power in the election held currently with the referenda. But they won it back in 1914, passed their proposals again in 1915, and prepared for another referendum.

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[1] The figures were :—

	For.	Against.
1. Legislative Powers ..	483,356	742,704
2. Monopolies	488,668	736,392

Commonwealth Parliamentary Handbook, 1901–20.

[2] The figures were :—

	For.	Against.
1. Corporations	960,711	986,824
2. Industrial Matters	961,601	987,611
3. Nationalisation of Monopolies	917,165	941,947
4. Trade and Commerce ..	958,419	982,615
5. Railway Disputes	956,358	900,046
6. Trusts	967,331	975,943

Commonwealth Parliamentary Handbook, 1901–20.

The arguments in their favour were greatly strengthened by the war, which necessitated the granting of increased powers to the Commonwealth Government. On the other hand, the Liberal opposition argued that the bitter conflict that another referendum would entail would be entirely out of place at such a period. Mr. Hughes, who became the Prime Minister towards the close of 1915, came finally to an arrangement with the State Premiers, by which they agreed that the States would voluntarily surrender to the Commonwealth practically all the powers asked for in the Bills for the period of the war and for one year afterwards.[1] All the States, except New South Wales, failed to carry out the undertaking, but the timely decision of the High Court in the case of Farey v. Burdett gave the Commonwealth the authority to exercise practically any power it wished on the grounds of military defence.[2]

When the war ended Labour had lost power and a Nationalist Government was in office. The need for the extension of the powers of the Commonwealth, along some such lines as the Bills proposed, was by this time a matter of general agreement amongst most members of both Houses of Parliament. The Government, therefore, took up the Labour proposals and introduced two Bills containing, with one or two important exceptions, the proposals introduced by the Labour Government in 1915.[3] The Labour Party complained that the Bills were not sufficiently drastic, and attempted to carry amendments for the purpose of strengthening them. But in spite of such differences of

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[1] *Round Table*, March 1916, pp. 342 *seq.*

[2] Keith: *War Government in the Dominions*, p. 308.

[3] The most important changes were that the Bill for dealing with railway disputes was dropped, and that elaborate provisions were introduced, by which an industry would not be declared the subject of a monopoly without a number of safeguards, such as a report from the High Court.

attitude they passed through both Houses of Parliament by general consent.[1] Nevertheless, when they were submitted to a referendum on December 13, 1919, both were rejected.[2]

This history indicates that over the range of constitutional amendments there is fully adequate protection against changes that the people do not support, quite apart from the Senate.

[1] Keith: *War Government in the Dominions*, pp. 309 *seq.*

[2] The figures were :—

	For.	Against.
1. Legislative Powers	911,357	924,160
2. Nationalisation of Monopolies ..	813,880	859,451

Commonwealth Parliamentary Handbook, 1901–20.

CHAPTER VI

THE LEGISLATIVE COUNCIL OF NEW ZEALAND

NEW ZEALAND has lately embarked upon a new experiment in the making of a Second Chamber. This will be described later, but as it has not yet been set into operation, the story of the events which led to the disappearance of the previous Second Chamber is more useful to our purpose.

The Parliament of New Zealand contains two Chambers—the House of Representatives and the Legislative Council. The House of Representatives follows the usual lines of democratic Chambers. It consists of eighty members, seventy-six of whom are elected by adult suffrage among the white and half-caste population, whilst the remaining four are elected by the Maoris, one in each of the four districts into which New Zealand is divided for this purpose.[1]

[1] Consolidated Statutes, 1908, No. 101, Sections 13 and 180.

The Legislative Council was created by the Constitution Act of 1852.[1] It was a nominated Chamber, the members being appointed by the Governor for life without any restriction being placed upon their numbers.[2] There was no provision for solving disagreements between the two Chambers, so that in the case of a complete deadlock over a Bill it was destroyed. Payment of members has been adopted for both Chambers, the sum paid to the members of the Upper House being at present £350 a year.[3] The only substantial difference, therefore, between the system in New Zealand and in Canada, was that in the former, there was no limit to the members of the Upper House, so that it could be "swamped" by the creation of new members. This system worked adequately up to 1890.[4]

[1] 15 and 16 Victoria, c. 72, ss. 33–39.

[2] When the Constitution of New Zealand was being discussed Sir George Grey, the Governor, proposed that each of the two Islands should be given a Provincial Council, and that these Councils, amongst their other duties, should elect the Legislative Council. The Home Government, however, rejected the scheme (Collier's *Life of Sir George Grey*, pp. 81 *seq.*).

[3] *New Zealand Official Year Book*, 1921–2, p. 28.

[4] "Although up to 1890 the need for reform was not urgent it was nevertheless distinctly felt. Sir Robert Stout complained of the continual rejection of his measures by the Upper House" (Dilke's *Problems of Greater Britain*, vol. ii, p. 424). A number of proposals for the reform of the

The Liberal-Labour Ministries.

But up to that time the Government had been in the hands of the middle class. Although political parties in New Zealand date from 1875, it is difficult to discover during the next fifteen years any very obvious differences between Liberals and Conservatives.[1] The year 1890, however, opens a new era in the history of the

Legislative Council were brought forward. In 1883 the Whitaker-Atkinson Government declared in the speech from the Throne that public opinion was fast coming to the conclusions that an elected should be substituted for a nominated council. They subsequently laid bills upon the tables of both Houses, proposing direct election by Proportional Representation, and thus anticipated the Act that was carried thirty-one years later. Two years later, Sir Frederick Whitaker in the Legislative Council carried a Bill through its Second Reading, providing that the Council should be elected by both Houses sitting together. This again anticipated the principle of a device, which has since been adopted in South Africa and the Parliament of Northern Ireland, and forms one of the proposals of the Bryce Conference of 1918. In 1887 the proposals to reduce the term of office of Legislative Councillors' life to seven years, and to limit their numbers to half those of the House of Representatives were accepted by the Ministry but failed to pass the Lower House. Three years later a similar Bill introduced by a private member was supported by the Government and carried through the House, but rejected by the Council on Third Reading by 17 votes to 13. See *New Zealand Parliamentary Debates*, vol. clix, pp. 146 *seq.*, and *House of Commons Paper*, 198, 1893, p. 5.

[1] See the remarks in Hight and Bamford's *Constitutional History and Law of New Zealand*, pp. 301 *seq.*

Colony. In that year the Progressive party swept the Colony and the well-known series of Liberal-Labour governments were in continuous power for twenty-two years.[1] The great Australian maritime strike which was destined to affect profoundly the politics of Australia, spread to New Zealand in 1890. In both colonies it was equally unsuccessful, but its results upon the future of political parties were very different in the two countries. In Australia it led to the immediate creation of the Australian Labour Party, but in New Zealand the old Liberal Party put itself at the head of the workers. A series of ministries was formed, consisting almost exclusively of lower middle class men, which yet carried through an advanced Labour programme that has turned the eyes of social students all over the world to the experiments of this colony. The Labour policy for the towns was accompanied by an equally sweeping agrarian policy for the country, in which the Government declared war on the great landowners, and as a result, won the support of the small culti-

[1] Mr. Ballance, the first Liberal-Labour Prime Minister, died in 1893 and was succeeded by Mr. Seddon. On Mr. Seddon's death in 1906, Sir Joseph Ward became Prime Minister and retained the position until the break up of the Government in 1912.

vators.[1] Supported by this combination of artisans and small farmers, the Liberals carried the elections of 1890, 1893, 1896, 1899, 1902, 1905, 1908, 1911, and ruled the colony continuously for a generation.

Nomination for a Term of Years.

As soon as a Government of this type appeared the composition of a Second Chamber—a secondary question up to that time—became an urgent issue. The new Ministry immediately turned its attention to this problem, and one of its early acts was to carry through both Chambers a Bill that, while retaining the system of nomination for the Legislative Council, reduced the tenure for all new members from life to seven years, although members could be reappointed at the end of their term.[2] This gives the Legislative Council in New Zealand its chief interest. Schemes for constituting a Second Chamber or a portion of it by means of nomination now always propose that the nomination shall be, not for life, as in Canada, but for a short term of years. The latest plan put forward by a British Government contains a proposal of this kind.

[1] Reeves's *State Experiments in Australia and New Zealand*, vol. i, c. 6.

[2] Legislative Council Act, 1891, s. 31.

New Zealand, therefore, furnishes an experiment lasting for twenty-three years by which we can examine the results of such a scheme.

The most obvious effect soon made itself felt. The new Act made no difference to the immediate situation, for it only applied to new members and did not affect the right of all existing members to retain their seats for the rest of their lives. The new ministry found that the Legislative Council contained twenty-six members who had been nominated by the Conservatives, and nine who had been nominated by the Liberals.[1] Mr. Ballance, therefore, requested the Governor to grant him the creation of twelve new members in order to assure him a reasonable share of debating strength. In his reply, Lord Glasgow, who had only arrived in the Colony two days before, took up a highly pedantic attitude. He offered the creation of nine, instead of twelve members, on the ground that the larger number would give the Government a clear majority in the Council, and that this would involve the process of " swamping," a device which ought not to be

[1] Lord Glasgow reported to the Colonial Secretary that in the Legislative Council " the Attorney General finds himself with the support of only at the outside, four or five members, none of whom possess any debating power whatever " (*House of Commons Paper*, 198, 1893, p. 14).

brought into play whenever a new government came into power, but only when a serious deadlock, insoluble by any other means, had occurred between the two Chambers.[1] A sharp dispute between the Governor and the Ministry followed, which was ended by a telegram from the Colonial Secretary, informing Lord Glasgow that the creation of twelve new members would still leave the ministry in a minority and that, therefore, no question of "swamping" arose, and instructing him to grant the request made to him.[2] The new spirit that had arisen was symbolised by the inclusion among the new councillors of a boiler-maker, a storeman, a compositor and a foreman.[3]

[1] *House of Commons Paper*, 198, 1893, pp. 15 and 17.

[2] *Ibid.*, 198, 1893, p. 39.

[3] The dispute was embittered by the events that had immediately preceded Lord Glasgow's arrival. Although the Conservative Ministry, under Sir Harry Atkinson, was defeated at the election of 1890, it did not immediately resign office. During the interval between his defeat and his resignation, Sir Harry Atkinson recommended the Governor, Lord Onslow, to create eleven new councillors, but ultimately, as the result of pressure from Lord Onslow, reduced the number to six. The opposition—about to become the Government—expressed their objection to any such appointments from a moribund Ministry, but Lord Onslow considered it to be his constitutional duty to accept the advice of his ministers for the time being. His attitude was ratified by the Colonial Secretary in a despatch, in-

For the next twenty-three years New Zealand exhibits the same broad results as Canada. As in Canada, during the early years of the new Government it was confronted with an Upper House which contained a majority of the nominees of the defeated ministry, and continually rejected its Bills. They threw out Mr. John McKenzie's Land for Settlements Bill in 1891 and took out its compulsory clauses in 1892.[1] In 1891 they also prevented the passage of the Land Bill, the Electoral Bill to extend the principle of one man one vote to by-elections, the Shop Hours Bill and the Friendly Societies Bill.[2] They twice struck out the compulsory

forming him that he had "acted strictly in accordance with the constitution of the Colony." It was, however, unfortunate that the granting of a request to a defeated government was immediately followed by the refusal to those who had been victorious (*House of Commons Paper*, 198, pp. 5–13).

[1] Reeves's *State Experiments in Australia and New Zealand*, vol. i, p. 275.

[2] See Drummond's *Life of Richard John Seddon*, c. xi, p. 63. "The Councils without any compunction rejected Bill after Bill, or altered the measures so that they were practically useless. In this way the Liberal Party was prevented in the first year of office from putting into operation the elaborate policy which it had been preparing for years, and which had the emphatic approval of the country. The session of 1891, owing to the obstruction of the Council, was largely a waste of good time."

clauses of the Industrial Arbitration Act.[1] They refused to pass the Women's Franchise Bill in 1892[2] and the Old Age Pensions Bill in 1897. It took five sessions, 1891–1895, to pass the Shop and Shop Assistants' Act.[3]

But after the Ministry had been in office for a few years, the second of the results that we have witnessed in Canada was reproduced in New Zealand. Mr. Seddon filled the vacancies in the Council with his own supporters, and by

[1] Reeves: vol. ii, p. 104.

[2] *Ibid.*, vol. i, p. 110.

[3] *Ibid.*, vol. ii, p. 188. There is some difficulty in explaining why Mr. Ballance and Mr. Seddon did not proceed to "swamp" the Upper House in the early years of its opposition, as the Governor would not have resisted, after the ruling of 1892. Apparently there was a feeling in their party that it was desirable to avoid hasty action, especially as the opposition of the Upper House could not be prolonged over a long course of years. This was due to the fact that the House of Representatives is re-elected every three years, and that the government majorities at successive elections showed clearly that public opinion was behind them. An election was held in 1893, the Land Repurchase Bill and Industrial Arbitration Bill passed the Upper House in 1894, and the Shop and Shop Assistants Bill in 1895. The Women's Franchise Act was passed in 1893, before the election—largely from motives of political strategy. The Old Age Pensions Bill introduced in 1897, just after an election, at which its principle had been discussed, was at first rejected by the Upper House, but passed in 1898, after a number of new Liberal nominees had been added to the Chamber.

1900 the effect of the stream of Liberal nominations became decisive. From that time onwards the Legislative Council contained a majority of Mr. Seddon's nominees and was much more completely under his control than the Lower Chamber. Mr. André Siegfried, a balanced and critical observer, who investigated the colony in 1904, dismisses the Legislative Council of that date in a very summary manner.

"The Legislative Council has become steadily more spiritless and feeble. The creation of peers had not at first given the Government a majority, but at each vacancy it replaced an adversary by an ally, so that at the end of a few years it was supreme in the Upper as in the Lower Chamber. The new peers gave themselves for some time the satisfaction of being independent and of voting as they wished. But they soon grew tired of it. How, indeed, could one expect any independence from members nominated for seven years with the title of 'honourable,' and paid by the session? Never in any country has such an assembly been able to resist the suggestion of its great elector, the Government. New Zealand can, therefore, be considered as a Single Chamber country. Its Senate, which once had some pretensions to aristocracy and independence, is now a mere council for the automatic registration of laws." [1]

The picture was broadly correct, but the Upper Chamber was something more than a mere registration machine, as it frequently

[1] Siegfried's *Democracy in New Zealand*, pp. 72 and 73.

introduced minor amendments, which were accepted as improvements by the Government.[1] This description is the one that can be anticipated of a nominated Second Chamber, while the Ministry that is responsible for the majority of the nominees is in power, and is identical with the picture of the nominated Canadian Senate during the Macdonald and Laurier Ministries.

Defeat of the Liberal-Labour Ministry.

But soon after Mr. Siegfried's visit the beginnings of the new situation appeared. Labour began to withdraw its allegiance from Mr. Seddon and put forward ten independent Labour candidates at the election of 1905. At the same time the small farmers on whom he had depended for his second line of support were becoming prosperous and consequently conservative. Mr. Seddon died in 1906. His party, under Sir Joseph Ward, won the election

[1] The duty of members of the Legislative Council was defined as follows, in that assembly, by Mr. Rigg :—

" Members at present are put in here for the purpose of passing the policy measures of the Government who appoint them. . . . Each person appointed should consider it his duty to help to pass the policy measures of the government that appointed him, but to amend the detail of measures when it is found that they are imperfect " (*New Zealand Parliamentary Debates*, vol. 105, p. 461).

of 1908, was very badly damaged in the election of 1911, and finally lost power in 1912—after a continuous reign of twenty-two years. The problem of the Legislative Council immediately revived. Once again the situation that usually confronts a new ministry under the system of nominated Second Chambers arose. The new government found itself confronted with a second chamber packed with the nominees of the fallen ministry. Like the ministry of Mr. Ballance, one of its first measures was to introduce a Bill for dealing with the situation, but going further than the government of Mr. Ballance, it proposed to sweep away the entire system of nomination. Ever since the change introduced by Mr. Ballance in 1891, the Conservative Party had stood for an elected instead of a nominated Second Chamber.[1] The main purpose of the new Bill was, accordingly, to secure that the Legislative Council should be directly elected by a popular vote, and, in order to differentiate it from the Lower House, that Proportional Representation should be the method of election.

The Bill was introduced into the Legislative

[1] See Mr. Bell's speech in the Legislative Council on August 21, 1912. (*New Zealand Parliamentary Debates*, vol. 159, pp. 148 *seq.*).

Council in 1912.[1] The Council, after carrying the Second Reading, passed an amendment that having affirmed the principle of the Bill, it did not consider it desirable to proceed further until the electors had been given the opportunity of expressing their opinion upon it. The Bill was therefore dropped for the Session.[2] It was re-introduced into the Legislative Council the next year, with modifications.[3] On this occasion the Council appointed a Committee which proposed a method of constituting the Council so opposed to that contained in the Bill that it again dropped for the year.[4] This disagreement between the two Houses would doubtless have continued until—as with previous Ministries—Mr. Massey had appointed a majority of his own supporters to the Upper House. But it was brought to an end by the outbreak of war, and the Bill was carried in November 1914.[5]

[1] *New Zealand Parliamentary Debates*, August 21, 1912, vol. 159, p. 144.

[2] The Government proceeded to carry through the Lower House a series of resolutions embodying the main principle of the Bill, and to introduce a new Bill into the Legislative Council reducing the term of office from seven years to three. The resolutions, of course, had no legislative force and the Bill was rejected by the Legislative Council (Cd. 6863, pp. 117, 118).

[3] *New Zealand Parliamentary Debates*, July 22, 1913.

[4] Cd. 7507, pp. 69, 70.

[5] Legislative Council Act, No. 59, of 1914.

The Act of 1914.

By the new Act New Zealand is divided into four large constituencies, of which eventually two will return eleven members each and two nine members each.[1] The Tasmanian scheme of Proportional Representation has been adopted in place of that advocated by the English Proportional Representation Society.[2] The two Houses will be elected by the same electors.[3] Three male Maori members may be specially appointed by the Governor.[4] By a novel provision the length of life of the Legislative Council is to be a minimum of five years and such further years as then elapse until Parliament is dissolved.[5] In this way elections for the Legislative Councils will be held at the same time as those for the House of Representatives, but since the latter is elected for three years only, the elections for the Upper House will fall on about each alternate election of the Lower House.

In order to solve disagreements between the two Houses over Bills, New Zealand has adopted the device of the Joint Sitting. If a deadlock over a Bill occurs, one session is allowed to pass, and if in the next session the Bill is

[1] Secs. 13 and 14 of the Act.
[2] Third Schedule.
[3] Sec. 10. [4] Sec. 21. [5] Secs. 11 and 12.

again introduced into the Lower House and the deadlock is repeated, the two Houses hold a Joint Sitting in which a majority decides the issue.[1] In addition to this solution, the Governor is left with a reserve power by which in urgent cases he can give the country an immediate opportunity of itself deciding the issue, by dissolving both Houses simultaneously.[2]

The Act is not yet at work, as its operation has been repeatedly postponed by Acts passed in 1916, 1918, 1920.[3] Under these circumstances any discussion upon its results is impossible, but the experiences of the Second Chambers described in other chapters indicates that an elective Second Chamber will lead New Zealand into a new series of difficulties.[4]

Conclusion.

The importance of the experience of New Zealand is that it enables us to estimate how far the evil of nomination for life can be cured by reducing the period of office to a limited

[1] Sec. 7. [2] Sec. 7

[3] The Act of 1920 postponed its operation until a date to be fixed by proclamation (*New Zealand Official Year Book*, 1921–1922, p. 28).

[4] See Mr. Samuel's speech (*New Zealand Parliamentary Debates*, vol. 159, p. 224).

number of years. The answer is that the broad results are the same in both cases. When a Ministry is in office for a long time, nomination for a limited period produces a more subordinate Chamber than nomination for life, as members depend for reappointment upon the favour of the Government.[1] When the Government is defeated it leaves behind it a Chamber made up of its pensioners and partisans. The nation, therefore, alternates between Single Chamber government and Second Chamber government of an indefensible type.

[1] Cp. *The Round Table*, December 1914, p. 186.

CHAPTER VII

THE PROPER FUNCTIONS OF A SECOND CHAMBER

THIS review of the Second Chambers of the Dominions shows that none of the three yet examined have succeeded in fulfilling the main function of a Second Chamber, that of thwarting the Lower House when, and only when, it is legislating contrary to the desires of the people. The reason for this failure is evident. If a Second Chamber becomes subject to the party system, it interferes unfairly with the party to which it is opposed, whilst it ceases to function when its own party is in office, with the result that it increases instead of diminishes the misrepresentation of the public will. But party is a necessary and inevitable institution of democratic government on a large scale, and the problem, therefore, of creating a representative Second Chamber which will be outside its control

is, by the nature of the conditions, insoluble. This leads us to the fundamental conclusion that a Second Chamber is an unsuitable instrument for ensuring that a Lower House will keep in touch with public opinion and attempts to use it for this purpose should be abandoned.

Shorter Parliaments.

It is not the object of this book to discuss the various alternative methods proposed for secuirng this object, such as the Referendum, Devolution, the Recall, and the creation of functional assemblies. The most obvious of these suggestions is that of shorter Parliaments. In so far as there is real danger that the House of Commons will lose touch with the electorate, the simplest expedient for preventing this is to lessen the term for which the House of Commons is elected. Although it was reduced from seven years to five by the Parliament Act, this country still retains a longer term of life for its Lower Chamber than any other nation in the world. Moreover, all English local authorities, from parish councils to the London County Council, are elected for three years.[1] The proposal for shorter Parliaments has been before the country for genera-

[1] The election is for a fixed term, so that the authorities cannot be dissolved before its expiration.

tions. The demand for annual Parliaments was one of the points of the Chartists' programme, and the proposal for triennial Parliaments has been put forward by both the Liberal and the Labour Parties. But the subject arouses little interest and has for some years receded into the background of politics. This fact indicates that, for the reasons given in the second chapter, the anxiety that the House of Commons will act in defiance of the electorate is not seriously felt, and is only brought to the front when Second Chambers are under discussion.

The Proper Functions of a Second Chamber.

We have reached the vital conclusion that Second Chambers cannot carry out fairly the chief function usually assigned to them, that of thwarting the popular Chamber if it acts contrary to the public will. This result is not a condemnation of Second Chambers, but is on the contrary the beginning of the solution of the question. As soon as attempts to force the Second Chamber into unsuitable uses is given up, and it is confined to functions that it can fulfil, the problem turns from one to which there is no answer into one where there is a choice of solutions.

The remaining functions of a Second Chamber

are, repeating the words of the Bryce Conference :

1. The examination and revision of Bills brought from the House of Commons, a function which has become more needed since, on many occasions during the last thirty years the House of Commons has been obliged to act under special rules limiting debate.

2. The initiation of Bills dealing with subjects of a comparatively non-controversial character, which may have an easier passage through the House of Commons if they have been fully discussed and put into a well-considered shape before being submitted to it.

3. Full and free discussion of large and important questions such as those of foreign policy at moments when the House of Commons may happen to be so much occupied that it cannot find sufficient time for them. Such discussions may often be all the more useful if conducted in an assembly whose debates and divisions do not involve the fate of the executive Government.

It will be seen that the first of these functions—the revision of Bills—is the chief, and that a Second Chamber which was successful in carrying this out would fulfil the two other functions the same time. This task is indeed of vital importance to democratic government. One of the special dangers of democracy on a large scale is that, as the mass moves onwards, it may trample minorities under its feet. In a period of rapid social change, when vested interests are

being assailed and special classes are being shorn of their privileges, it is particularly necessary to ease the transition for those minorities who are in any case bound to suffer. If they are treated, not as victims who are caught in a change of social and political ideas, but as criminals to be punished, the legislation that strikes at them will not only be vindictive, but will be met by a reaction against the hard cases that it produces. The crude doctrine that the only right that a minority possesses is to turn itself into a majority leads to bad laws. Minorities have the right to modify legislation. The House of Commons, at such a time, driving through Bills under great pressure, leaving the examination of its details to Committees which meet practically in private, and stifling the debates in the House itself by a Closure which sometimes forbids a syllable of discussion on more than half the clauses of the Bill, cannot be relied upon to introduce those careful modifications of the general principle of a measure by which the claims of minorities can be met.[1]

The chief function of Second Chambers is not,

[1] When, for example, the Insurance Act of 1911 left the House of Commons, masses of clauses affecting the vital interests of numbers of institutions had never been subjected to a word of discussion. The situation was

therefore, as is usually assumed, to defend the majority against the popular House, but to defend the minority. Their duty is to modify legislation but not to defeat it. By confining them to this modest but practicable purpose, it is possible to avoid the failures that have beset the attempts to force them into a more ambitious rôle.

There are two requisites of a Second Chamber whose purpose is to revise legislation and ensure proper discussion of the claims of minorities: (1) It must be able to compel the Lower House to give full consideration to all suggestions which are consistent with the general principles of the Bill that is being discussed, and (2) it must not have the power to destroy a Bill or defeat the fundamental policy at which it aims.

I shall, in the next chapter, discuss the two Second Chambers which most nearly fulfil these conditions, those of South Africa and of Norway.

only saved because when the Bill reached the House of Lords, the Government itself threw down quantities of amendments on to the table without which it would have been quite impossible to bring the Act into operation.

APPENDIX TO CHAPTER VII ON (1) THE FRENCH SENATE. (2) THE SENATE OF THE UNITED STATES.

(1) THE FRENCH SENATE.

The conditions of France are so different from our own that it is not safe to draw more than certain limited conclusions from her experience. But the French Senate obtains a special interest from the fact that it is the best example amongst modern constitutions of a Second Chamber based upon the principle of election by local authorities, a plan which has had considerable support in this country since Lord Rosebery and Lord Dunraven suggested it in the House of Lords in 1888.[1]

French Local Government differs from ours in having, outside Paris, a practically uniform system of administration from the village to the largest provincial city. Every town (except Paris), village, or group of villages has its Commune with its elected "Conseil Municipal." These Communes, of which there are 36,000, vary very greatly in size and are the fundamental units of French local government, with a history stretching back beyond the Napoleonic age and

[1] House of Lords Debate, March 19, 1888, and Lord Dunraven's "House of Lords Reform Bill," introduced March 28, 1889.

overshadowing the newer and more artificial creations that the Revolution introduced.

The next area that concerns the Senate is the "Arrondissement" with an elected "Conseil d'Arrondissement" of at least nine members. It meets seldom and has so little vitality that there are frequent demands for its abolition.[1] The widest area in Local Government is that of the Department, with an elected Conseil General to deal with such subjects as the maintenance of departmental roads and railways, the building of prisons, asylums, prefectures, the supervision of relief to the poor and of the loans that the Communes wish to raise.[2]

Character of the Senate.

The special characteristics of the French Senate are chiefly explained by the circumstances under which it was created. The National Assembly, which met in 1871, after the defeat of Sedan and the establishment of the Republic on September 4, 1870, was strongly monarchist

[1] The Canton—a subdivision of the Arrondissement is negligible for our purpose.

[2] There is also in each department a paid Prefectoral Council, consisting of three or six members appointed by the President and acting chiefly as a Court of administrative law. It has no connection with our present subject, as it has no share in the election of the Senate.

in its sympathies. Thiers—the inevitable Chief of Executive and First President—a strictly conservative statesman, was nevertheless a supporter of the Republic, and after two years was voted out of power by the Royalist majority in the Assembly. The new President, Marshal Macmahon, was of monarchist sympathies, and the new Prime Minister, the Duc de Broglie, was the leader of the Orleanists. This was the critical period for the continued existence of the Republic, but the divisions between the Legitimists and the Orleanists had already weakened the Royalists, and when they appeared about to unite in favour of the Count de Chambord, his demented refusal to recognise the the tricolour rendered him finally impossible as a candidate. The result was that while royalism was defeated, the modern republican constitution was the work of a predominantly monarchist Assembly. The natural inclination of such an Assembly was to throw power into the hands of the more conservative elements of the constitution, but manhood suffrage, won by the revolution of 1848, rested upon too deep a sentiment to be destroyed, and was bound to be the basis on which the Chamber of Deputies was elected. The Assembly, therefore, set up the Senate as the stronghold of Royalist sentiment

and stamped upon it a character, which, in spite of the reforms which have since been introduced, has maintained it as a highly conservative institution.

The Senate contains 314 members.[1] They are elected in each department by an electoral college made up of (1) Delegates from the Communes in the Department; (2) Members of the Conseil General; (3) Members of the Conseil d'Arrondissement; (4) The Deputies from the Departments.[2]

By far the greater number of the electors in each college consists of the delegates from the Communes, a feature summed up in Gambetta's well-known description of the Senate as "The Grand Council of the Communes." Senators are elected for nine years, one third retiring every three years. They must be at least forty years of age.

The effort to ensure that the Senate should be a monarchist instrument was specially emphasised by two features of its original constitution of 1875.[3]

(1) Only three-quarters of the Senate, 225

[1] The number was increased from 300 to 314 by the Law of October 19, 1919, in order to give representation to Alsace Lorraine—on her re-entry into France.

[2] Eight Senators are elected from Belfort, Algeria, Martinique, Guadeloupe, Réunion, and the French Indies.

[3] Constitutional Law of February 24, 1875.

members, were elected in the manner that has been described. The remaining 75 were elected for life. They were to be elected in the first instance by the Assembly with its monarchist majority, and subsequently by the Senate itself.

(2) It was believed that the small village and country communes were the chief centres of royalist sentiment, whilst the towns were republican, and for this reason all communes, irrespective of their population, were given one representative in the electoral college, so that the preponderance of voting power was with those of the smallest size.

These calculations were fulfilled in the first years of the existence of the Senate. The first Senate and Chamber of Deputies met in 1876, and the conflict between republicans and monarchists immediately opened. The new Chamber of Deputies had a strong republican majority, but the Senate was anti-republican. The result was that, during the critical days of the "16th May" period, when Marshal Macmahon, the President, dissolved the Chamber without waiting for the close of its period of four years life, the Senate, whose assent was necessary to this Act, supported the policy of the President. As it turned out, the electors to whom Marshal Macmahon had appealed turned

against him. There was a great republican victory at the polls, Marshal Macmahon resigned, and the republic had no further shocks until the emergence of General Boulanger. During this period the reform of the Senate was undertaken, and the two peculiarly monarchical devices of 1875 were abolished. As the seventy-five life senators died, their places were filled by the same system of election as for the other 225.[1] By the time these reforms were carried, the small communes had ceased to be the centres of monarchical strength, but nevertheless, the principle of equal representation for all communes was abandoned, and a system of grading the number of their delegates from one to twenty-four (thirty in Paris) was adopted. The existing method discriminates against both the small rural communes and the large city, and is most favourable to towns of about 4,000 inhabitants. The favour shown to the small towns was due to the desire to avoid the conservatism of the small communes on the one hand and the radicalism of the large towns on the other.[2]

[1] Law of December 9, 1884.

[2] Professor Barthélemy in his article " Les Résistances du Senat " in *Le Reine du Droit Public*, Tome xxx, November 2, 1913, gives a number of examples of the effect of this system. Lille, for example, with a population of 216,000 inhabitants

The general characteristics of the Senate are easy to discern. It had ceased to be a monarchical assembly even before the reforms of 1884, and in subsequent years has become a protection to the Republic, and a stronghold of the Radical party. But in all the newer issues of social legislation it has been a distinctly conservative body, which delayed for many years the full scheme of old age pensions and the special pensions for state workers, opposed a progressive income tax, electoral reform, a weekly holiday for workers, and the law forbidding children's work in factories and has, up to the present, defeated women's suffrage.[1]

These facts illustrate certain general conclusions. Indirect election usually produces a conservative body, as electing assemblies select established and respected members of the type who are generally acceptable. The Committee of the House of Commons contain on the whole their "safe members" and the tendency is equally strong with the French local authorities.[2] The conservatism of indirectly

has 24 delegates, while a number of small towns with a total population of a little over 10,000 inhabitants have 36 delegates.

[1] Barthélemy, "Les Résistances du Senat."

[2] Professor Barthélemy's memorandum to the Bryce Conference.

elected members is strengthened by the predominance of elderly men. The assemblies which elect them consist of experienced politicians who are not inclined to elect new men of less established position than their own. The average age of Senators is 60 years. Most of them have already filled other public positions, and one of the marked features of the Senate in recent times is the election to it of men who have previously made a reputation in the Chamber of Deputies.[1] Finally, a Chamber where the members are elected for nine years need not concern itself very closely with democratic opinion, especially as a large proportion of them will, owing to their age, not be looking forward to re-election.

The French Senate, therefore, is a body of considerable personal distinction, containing many of the leading figures in public life, and with committees that are claimed to be superior in personnel to those of the Chamber of Deputies. On the other hand, its lack of contact with the people and its elderly atmosphere have produced a lifeless assembly, which is regarded by the public with general indifference.

[1] The number of ex-ministers in the Senate is sometimes greater than in the Chamber of Deputies. In the Senate elections of 1912, sixty of the candidates for the hundred seats to be filled were members of the Chamber of Deputies.

Powers of the Senate.

"The Senate has the right concurrently with the Chamber of initiating and passing laws. Finance Bills, however, must be first presented and passed by the Chamber of Deputies." [1] These provisions give the Senate equal power over legislation with the Chamber of Deputies, both in finance and general measures. In the case of general Bills this power is freely exercised, so much so that the Chamber of Deputies not infrequently passes Bills which it fears to refuse and relies upon the Senate to reject them. Both Chambers possess standing orders which provide, in case of disagreement, for conferences between committees containing an equal number of Senators and Deputies. These Conferences usually lead to a compromise, but if they fail the Bill lapses.

The authority of the Senate over Finance Bills has been a subject of permanent dispute, dating from the birth of the Republic, between it and the Chamber of Deputies. The only limit to the power of the Senate laid down by the constitution is that it cannot initiate money Bills. This leaves the Senate with the legal right of unlimited amendment of Finance Bills

[1] Article 8 of the Law of February 24, 1875.

coming from the Lower House which the Chamber has never acknowledged, and, by its growing habit of only passing the budget at the last moment, made difficult to enforce. The Senate has insisted in particular, that, when an item of expenditure proposed by the government has been rejected in the Chamber, it has the right to restore it, as in doing so it is only supporting the initiative of the Government. Although the Chamber has continually resisted this demand, the compromises which have been reached when the Senate has stood firm have given it the strength of a constitutional practice. These facts illustrate the tendency of Second Chambers which stand upon a representative basis to claim authority over finance. "Restrictions of financial power, logical enough for hereditary or nominated Chambers, is illogical for the French Senate, especially when in other legislative matters the two Chambers have identical powers." [1]

Another illustration of the tendency of elected Second Chambers to assert co-ordinate power with the first is shown in the claim of the Senate that Ministers are responsible to it, a subject upon which both politicians and constitutional lawyers in France hold varying opinions. The

[1] Professor Dietz's memorandum for the Bryce Conference.

legal right of the Senate is clear, and it is laid down in Article 6 of the Law of February 25 to 28, 1875 :—

"The Ministers are collectively responsible before the Chamber for the general policy of the Government."

In practice such a power has been found difficult to exercise. Ministries have resigned as the result of an adverse vote of the Senate in 1876, in 1883, in 1890, in 1896 and in 1913, but in all but one of these cases the Cabinet was ready to retire without a struggle. The only occasion in which the Senate compelled the resignation of a Ministry against its will was in the case of the Bourgeois Ministry in 1896, but in this case the ultimate explanation of the Cabinet's acceptance of the position was that it could not rely upon the support of the Chamber of Deputies.[1]

Election by Local Authorities.

The most important question for our purposes raised by the French Senate is whether an election of a Second Chamber by Local Authorities introduces national issues into local politics. There is no evidence that this is the result in

[1] A detailed account of this episode is given in Lowell's *Governments and Parties in Continental Europe*, p. 23.

France. Senatorial elections come too infrequently and the number of authorities concerned is too great for such influences to be felt. These influences are not brought into play until the actual delegates have been selected, but then they are very considerable. The Prefects play an exceedingly active part in elections, and the fact that they know a long period beforehand who are likely to constitute the Electoral College facilitates the exercise of pressure on behalf of the party that they support.[1] The Bryce Conference rejected election by local authorities for two reasons; (1) The Second Chamber disputes the authority of the first; (2) National issues are introduced into local politics. The experience of France on the whole gives support to the first argument, but not to the second.

The Senate, like most continental Second Chambers, possesses judicial as well as legislative functions. It acts as a Court of Justice to try cases if the President or Ministers are impeached by the Chamber of Deputies, or if a decree is issued by the Cabinet constituting it a court to try anyone accused of an attempt upon the safety of the State.

Such provisions indicate that the Senate in France has duties to perform for which the

[1] Barthélemy's "Les Résistances du Senat."

need has not been felt in this country. The Republic has never been for long out of danger, and any institution which would help to protect it against a sudden *coup d'état* has had a supreme justification. Although created as a stronghold of monarchy, the Senate has proved itself to be a pillar of the existing State, and on three critical occasions in 1885, 1889, 1899 has come to the help of the republic. The provision that the Chamber cannot be dissolved without its assent is intended to strengthen its power to deal with such emergencies. There are no comparable dangers to be apprehended in this country. The special features of the French Senate, therefore, like those of the French system of administrative law and centralised local government can be explained or defended on many grounds applicable to France, but not to Great Britain.

(2) THE SENATE OF THE UNITED STATES.

In the United States the House of Representatives and the Senate stand respectively for the two principles of representation according to population and according to States. The House of Representatives is elected by constituencies of roughly equal population, whereas in the

Senate each State has two members irrespective of its population. The House of Representatives is elected for two years. Senators are elected for six years, one third retiring every two years. Senators were originally elected by the legislatures of each State, but owing to the financial influence of "big business" over these comparatively small bodies, the election was in 1912 vested directly in the people of each State.[1]

The Senate is now the only example in the world of a Second Chamber that is incontestably more powerful than the first. The chief reasons for this are inherent in the American constitution. Its most fundamental difference from our own is that it rejects the system by which the Government depends for its existence upon the confidence of the Legislature, and elects the President, and indirectly the Executive, by a separate and independent vote. The consequence is that the power of making and unmaking governments which is the source of authority of the Lower House in constitutions of the British type does not rest in the hands of the House of Representatives. The American constitution, in fact, goes farther, and such small share of administrative control as is allowed to Congress is by specific enactment vested exclusively in the Senate,

[1] Article 17, Constitution, proclaimed May, 1913.

which was originally intended to be an assembly of executive rather than legislative importance. Its concurrence is needed in the appointments made by the President of "ambassadors, public ministers, consuls, judges of the Supreme Court, and all other offices whose appointments are not otherwise provided for." [1] Although it has only once interfered with the President's appointments to the Cabinet, in other cases it has established the custom that he shall consult the Senators from the State in which the appointment is made if they belong to his party. The special share which this convention confers upon Senators in the distribution of the "spoils" system gives them greater power than members of the House of Representatives. But the executive power which most frequently brings the Senate to the attention of foreign nations is the need for the concurrence of two-thirds of the Senators present in any treaty before it is valid, a power which makes the Foreign Affairs Committee of the Senate as important a factor in foreign policy as the President or the Secretary of State.[2]

The most obvious reason, therefore, for the

[1] Article 2 of the Constitution.

[2] Treaties are nominally negotiated by the President, but owing to his absorption in other duties the Secretary of State is usually a more important official.

supremacy of the Senate over the House of Representatives is the simple one that the American constitution deliberately provides for it. To these must be added the causes explained in Lord Bryce's *American Commonwealth*. The smallness of the Senate in comparison with the House of Representatives gives each member of the former assembly a larger share of power and a better opportunity for education in the use of it than the Lower House affords. In all disputes between the two Houses the Senators, with their life of six years, can act with much greater independence and force than the House of Representatives whose members, elected for two years alone, are "always candidates." These causes themselves produce a third. The position of a Senator is so much more attractive than that of a member of the Lower House, that the personnel of the Senate is superior to that of the House of Representatives.

As it is not proposed by anybody that the Second Chamber of Great Britain should be more powerful than the House of Commons, the United States does not provide suggestions of value to this country. Moreover, the essential condition that a second chamber must observe in this country is that in the last resort it must obey the will of the people. The American

Senate is not bound by any such doctrines. As the guardian of State rights its strict constitutional function is to oppose the will of the people in cases where it does not coincide with the will of the majority of the States. It is generally agreed that for these reasons the American Senate cannot be taken as a guide for this country.[1]

The constitution of the United States is, in fact, based upon a distrust of all governments that is alien to the ideas of Great Britain. The original suspicion embedded in the constitution by the Federalists, on account of their fear of democratic excess, has been maintained by the people themselves on account of their suspicions of the influence of the money power over all political institutions.[2] The American Senate, therefore, can only be seen in its proper setting by viewing it in connection with the other devices by which the United States weakens

[1] Cp. Temperley's *Senates and Upper Chambers*, p. 16. The Bryce Conference did not consider it worth while to call for any evidence with regard to the American Senate.

[2] "The aim of the constitution seems to be not so much to attain great common ends by securing a good government, as to avert the evils which will flow, not merely from a bad government, but from any government strong enough to threaten the pre-existing committees or the individual citizen" (Bryce's *American Commonwealth*, vol. i, p. 306).

the power of its government by multiplying the opportunities for a deadlock. The President's veto is the first of these. If he imposes it upon a Bill he can only be overridden by a two-thirds majority of each House separately. He can thus exercise the power of a third Chamber of great strength. In the case of all constitutional amendments there are still further obstacles in the way of their passage. They can only be carried by a two-thirds majority of each House, and must then be ratified in three-fourths of the States, either by their legislatures or by specially summoned conventions.[1] The United States carries distrust of government to a degree which would rob its constitution of the power of dealing with the complicated issues of a country such as Great Britain.[2]

[1] This is the usual plan. The constitution also provides that in place of the passage through the two Houses, a convention may be held on the application of the legislatures of two-thirds of the States. If the amendment is carried by the convention it has then to be ratified as above. This method has never been used.

[2] In Mr. Temperley's *Senates and Upper Chambers* (pp. 28 *seq.*), the opinion is expressed that whilst the experience of the Senate of the United States has no application to this country, this is not so in the case of the Senates of the individual States.

But most of the causes which render the experience of the federal government inapplicable to this country are

equally present in the State governments. They all follow the federal government in having a non-parliamentary executive. The Governor and the chief state officials hold their office independently of the confidence of the legislature and are usually elected by direct popular vote. The distrust of governments of which the United States Senate is only one instrument, is carried a stage farther in most of the States. The veto of the President in the United States has its parallel in the veto of the Governor in the States, and the exercise of this power is his most important function. When he does so, a special majority of the legislature is needed to override him. The special difficulties in the way of carrying an amendment to the constitution of the United States are repeated by the provisions to be found in almost all States, that any Bill to alter the constitution must, after passing all other stages, be submitted to a referendum. Most of the States are not satisfied with the obstacles to legislation to be found in the federal constitution, but devise additional impediments of their own—such as limitations on the length of sessions, and on the subjects that may be dealt with, provisions insisting that legislation shall observe certain careful forms that will prevent abuse, and enactments that sessions shall only be held every second or fourth year.

CHAPTER VIII

THE SENATE OF SOUTH AFRICA

THE voluntary creation of the Union of South Africa out of the four communities that only seven years before had been locked in the South African War was a surprising achievement. It was rendered more remarkable by the fact that these four colonies rejected the federal form of union in favour of the stricter bonds of a completely unitary system. Its immediate causes arose from the issues of customs and railways, which were becoming so acute that, in order to save disaster, union was forced on at a time when it seemed far distant. Besides these questions there loomed the ever increasing menace of the native problem which, if it is to be solved at all, must be solved in unison.

The Provincial Councils.

Each of the four original colonies, Cape Colony, the Transvaal, Natal, and the Orange River Colony, has a Provincial Council, a dis-

tinctly subordinate assembly with powers not greater than those of local government, whose ordinances are only valid as long as they are not repugnant to an Act of the Union Parliament The Provincial Councils are elected for three years by the same electors as the House of Assembly. Each Council contains the same number of members as the province sends to the House of Assembly, provided that the members do not in any Council fall below twenty-five.[1]

[1] South Africa Act, 1909, ss. 70–71, 85–91. The Administrator, the head of the administration, is an official appointed for five years, and paid by the Union Government (South Africa Act, 1909, ss. 68–69). He is the Chairman of the Executive Committee of the province, but beyond a casting vote, in addition to his own, in case of an equal division, he has no more power than the other members over those matters which are within the sphere of this body. On matters falling outside the scope of provincial authority he is the servant of the Union Government and must carry out any instructions that they convey to him. The administration of each province is in the hands of an Executive Committee, consisting of the Administrator and four other members elected by the Provincial Council for three years. They are elected by Proportional Representation—a provision which secures that the minority parties in the Council shall be represented. The Executive Council is therefore intended to approximate to the committees of the British Local Authorities rather than to our Cabinet, which is, of course, drawn from the majority party only (South Africa Act, 1909, ss. 78–84).

The House of Assembly.[1]

The House of Assembly, the Lower Chamber, is elected mainly by single member constituencies, containing approximately equal numbers of European male adults, although a variation of 15 per cent. above or below the strict quota may be allowed to any constituency in order to make allowance for sparsity or density of population.[2] After each quinquennial census a commission of three judges carries through a scheme for the redistribution of members among the different provinces. The number of members at the beginning of the Union was 121, has at present risen to 134,[3] and is intended to rise finally to 150.

The Senate.[4]

The Senate of the South African Union contains 40 members, a figure which was chosen in order that the numbers of the Senate should

[1] South Africa Act, 1909, ss. 32–50.

[2] This was the compromise which ended the dispute, which at one time threatened to wreck the negotiations for the Union between the principle of "one vote, one value," and the claims of the Cape Parliament that the country districts needed special representation.

[3] In 1923.

[4] South Africa Act, 1909, ss. 24–31.

be one-third of that of the House of Assembly,[1] and the significance of which will appear later. These forty members were selected by a combination of the two principles of nomination and indirect election, a blend to be found in no other Second Chamber in the Dominions.

(1) *Nomination.* Eight of the members are to be nominated by the Governor-General in Council. Four of this group are to be selected because of their "thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races of South Africa."[2] The other four are not to be drawn from any special category, although the Convention Debates make it clear that they were expected to contain members of legal experience, who would be specially qualified for the technical revision of Bills coming up from the Lower House.

(2) *Indirect Election.* The discussions in the Convention on the methods of selecting the remaining thirty-two Senators were long and heated, and were finally closed by the appointment of a Committee to draw out a scheme

[1] Minutes of South African National Convention, October 27, 1908.

[2] South Africa Act, 1909, s. 24.

which embodied as much general agreement as was possible.[1]

The first question that arose was whether the Senate should be based strictly upon population, or whether, following the federal plan, the four provinces were to have equal representation. The same arguments were used on both sides as in Australia. The delegates from Cape Colony felt that they were acting more generously than the electors of the Cape would approve in agreeing to put its representation in the Senate on a par with that of the smaller colonies. On the other hand the smaller colonies feared complete absorption, and without the safeguard of equality of representation in the Senate, Natal and the Orange River Colony might have refused to enter the Union. Cape Colony finally accepted these arguments, taking into consideration the fact that the arrangement was a provisional one for ten years, and could then be altered.[2]

Each province has, therefore, eight members in the Senate. These members were selected, in the first instance, by the expiring Parliaments

[1] Minutes of South African National Convention, October 26, 1908.

[2] Sir Edgar Walton's *Inner History of the National Convention*, p. 160.

of the four colonies, as their last important act. The two Houses of each Legislature met, and jointly elected the eight Senators for the provinces. These members held office for ten years, and any casual vacancy among them due to death or other causes was filled up by election by the Provincial Council of the province.[1]

The ten years have elapsed [2] and the second method of constituting the Senate has now come into operation. Under this method, while the position of the nominated members and all the other provisions relating to the Senate are left unaltered, an important change is introduced in the method of electing the eight members from each province. They are now elected for each province by a group of electors consisting of (*a*) the members of the Provincial Council of the Province, (*b*) the members of the House of Assembly elected from the Province.

The South African Senate, therefore, represents a combination of the three principles :

(*a*) *Nomination.*

[1] South Africa Act, 1909, s. 24.

[2] The South Africa Act was so worded as to leave it in doubt whether the period of ten years came to an end on May 31, 1920 or October 31, 1920, and a Bill had to be carried through the Union Parliament enacting a later date (Votes and Proceedings of the House of Assembly, May 3 and 5, 1920, and Minutes of Senate, May 21 and 25, 1920).

(*b*) *Election by Local Authorities.* The proposal for the election of a Second Chamber by local authorities has had a history of some length in this country, and was contained in schemes brought before the House of Lords in 1888 by Lord Rosebery and Lord Dunraven.[1] They were, however, rejected by the Bryce Conference, on the grounds that the issues on which local authorities are elected ought not to be confused by the introduction of national politics.

(*c*) *Election of the Upper House by Members of Parliament.* Here South Africa has adopted an idea, the rapid growth of which in recent years is the chief modern development in the constitution of Second Chambers.

The hope that the Senate would consist of men of substance and of mature age, who would view public events in a detached spirit, was expressed in the provisions that Senators must be thirty years of age, and the owners of immovable property within the Union worth not less than £500 clear of mortgages.[2]

Powers of the Senate.

The most important question, the power that the Senate may exercise, has been answered

[1] See House of Lords Debate, March 19, 1888, and Lord Dunraven's "House of Lords Reform Bill," introduced March 3, 1888.

[2] South Africa Act, 1909, s. 26.

in South Africa by simple provisions which were carried through the Convention without difficulty.[1] If the Senate rejects a Bill which has come to it from the House of Assembly, or introduces amendments to which the Lower House will not agree, the Bill is delayed for one session. If, at the close of this interval, the House of Assembly again carries the Bill and the Senate again refuses to pass it, the Governor-General may convene a joint session of the two Houses at which the House of Assembly, with over three times as many members as the Senate, has the preponderant power.[2] This device of determining the differences between the two Houses by Joint Session has already been met with in Australia and New Zealand, and was indirectly derived from Australia by South Africa. After the Boer War the Transvaal copied the Australian device and the South African Constitution borrowed it in turn from the Transvaal.

The usual provisions are laid down by which the Senate may not originate or amend money Bills.[3] If it rejects them the Joint Session

[1] Walton's *Inner History of the National Convention*, p. 163.

[2] South Africa Act, 1909, s. 63.

[3] *Ibid.*, 1908, s. 60.

takes place immediately without the delay of a session.[1]

Beyond these provisions the Governor-General has a reserve power of dissolving both the Senate and the House of Assembly simultaneously. This power has not been utilised, and in view of the other means provided for solving a deadlock it is unlikely to be needed.[2]

The provision for the solution of deadlocks, after the delay of only one session, is the most interesting feature of the South African Senate, and marks it off sharply from all other Second Chambers in the Dominions. The conception on which all these latter have been based is that the Senate should be empowered to contest the fundamental principle of the Bills coming from the Lower House and, if it thought fit, to destroy them. South Africa consigns to the Senate a different and more modest rôle. It can delay Bills from the Lower House sufficiently long to make it well worth the while for that House to listen to its suggestions, but if the Lower House is determined the Senate

[1] South Africa Act, 1909, s. 63 (In the shape of which the Bill was first drafted, the provision that there should not be even a single session's delay applied to all Bills, a proposal that would have reduced the power of the Senate still further).

[2] *Ibid.*, 1909, s. 20.

will probably be overridden. It is, therefore, as the President of the Convention, Lord de Villiers, described it, "a house of review," and attempts to be nothing more.

It is significant that, whilst there are numerous proposals to alter the constitution of the Senate, there is no movement to increase its powers so as to enable it to fill the more ambitious place which most other Second Chambers endeavour to occupy.

The Reform of the Senate.

The new constitution of the Senate has not been in operation long enough for us to estimate its results. But there have been a number of discussions and enquiries, which enable us to indicate some of the opinions which are being formulated.[1]

Parliament was empowered by the South Africa Act to devise a fresh constitution for the Senate, after the preliminary Senate of the first ten years had come to an end, and the question whether this power should be exercised was raised, as the end of this term of years approached. It was first discussed in the House

[1] The debates of the South African Parliament have not been officially published since the end of 1915, but are, of course, reported in the newspapers.

of Assembly in 1917, and from that time onwards three or four debates on the subject took place each year in either the Senate or the House of Assembly. But, as General Smuts explained, the situation that arose from the war so absorbed public attention that the question of the Senate was never taken up seriously.[1] All that was done was that the Senate itself appointed a Select Committee on its future constitution, whose report is of importance as an indication of the progress of opinion. During the session of 1920, the Prime Minister announced his intention of setting up a Speaker's Conference consisting of members of all parties drawn from the two Houses of Parliament, on the model of the Bryce Conference which had been held in England.[2] The idea was accepted by all parties, and the formal announcement of the Conference was made by the Prime Minister in the middle of August 1920. It is important to notice that the terms of reference of the Conference, as of the previous Senate Committee, dealt only with the constitution of the Senate and not with its powers.[3]

[1] House of Assembly, May 14, 1920.

[2] House of Assembly, May 19, 1920.

[3] The terms of reference are as follows:—

"The Conference will consider and report to the Government on the necessity or otherwise of any further provision

The Report of the Senate Committee.

A summary of the Report of the Senate Committee will enable us to compare its suggestions with those of the Speaker's Conference, the more authoritative body.

Its main proposals were as follows :—

(*a*) The numbers of the Senate should still remain, as near as possible, one-third those of the House of Representatives.

(*b*) The nominated element should be reduced to the four members appointed on account of their knowledge of native affairs.

(*c*) The system by which each province has equal representation in the Senate should be retained.

(*d*) The eight members from each province should be directly elected by popular vote on the system of Proportional Representation.

(*e*) The franchise for elections to the Senate should be the same as for the House of Assembly, but it should be confined to persons over thirty years of age.

in respect of the future constitution of the Senate, and in that connection make recommendations on the election or nomination, or both, of its members, and in what manner and for what periods the dissolution of the Senate, the periodic retirement of Senators, and the filling up of casual vacancies, shall be provided for, and any incidental questions which may arise in connection with the above matters" (Senate, S.C. 4, 1918).

(*f*) The duration of each Senate should be for ten years, half of the members retiring every five years.

(*g*) As the Senate would now be a body mainly directly elected, its power over money Bills should be extended along the lines followed in Australia, and it should have the right to: (1) amend money Bills which do not deal with the ordinary annual services of the Government; (2) send down suggestions to the House of Assembly in the case of Bills which it has no power to amend.

It will be seen that the most important proposals were that the Senate should be based upon direct election, and that as a consequence its powers over money Bills should be increased. Both these proposals were repeated by the Speaker's Conference.

The Speaker's Conference.[1]

The first question raised at the Conference was whether the Union needed a Second Chamber of any kind. A considerable number of members in the National Convention had regarded a Second Chamber as a costly institution, which would be of no service to the State, and

[1] Conference on the Future Constitution of the Senate, Union Government Paper, 65.

might be an intolerable nuisance. Their views were not accepted, but the very restricted powers granted to the Senate makes it a Second Chamber with such limited authority that it would not seem worthy of the name to advocates of a more potent Upper House.[1] This fact saved the South African Senate from the attacks directed at its more powerful companions, and although the Labour Party tended to a preference to a Single Chamber system,[2] the Speaker's Conference decided against it by a large majority.

1. *Nomination.* It will be remembered that of the eight nominated members, four were to be selected for their special knowledge of native affairs, and the remainder for general reasons. The hope was that the latter group would introduce a small nucleus of impartial and highly qualified members, who would represent a different type to those produced by the working of party politics. But the complaints that we have met elsewhere, that the Government nominated its own party supporters, were repeated in South Africa.[3] Both the Speaker's Conference and the Senate recom-

[1] Cp. Senate Debate, May 21, 1920, and House of Assembly Debate, May 24, 1920.

[2] House of Assembly Debate, May 14, 1920.

[3] Debate in House of Assembly, August 12, 1920, and Walton's *Inner History of the National Convention*, p. 164.

mended the abolition of nomination for general purposes, and its use only for the four members chosen for the special object of representing native interests. Even for this limited object some of the members wished to circumscribe the Government's freedom by requiring recommendations from some such bodies as the Native Affairs Commission, but this suggestion was not insisted upon.

2. *Direct Election.* The most important question that arose was the method of electing the thirty-two Senators, who had hitherto represented the provinces. Many members of the Conference were of opinion that the principle of equal representation of each province should be abandoned, and that the Union should be divided into a number of equal areas without reference to provincial boundaries, but the Conference finally decided that the principle of selecting eight Senators for each province should be retained. On the vital question of how these Senators were to be selected the Conference followed the Senate Committee, abandoned entirely the system of allowing the provincial Councils a voice in the selection, and recommended direct election by means of Proportional Representation. In order to provide the large electorates which Proportional Representation

requires, each province is to be a single constituency. The Speaker's Conference, therefore, for the bulk of its members, reached the same proposal as New Zealand has now adopted.

3. *Election by Members of Parliament.* The principle of election by members of Parliament is contained in the existing constitution of the Senate, and is retained by the Speaker's Conference for the small group of remaining Senators, who, they propose, shall be elected by the members of the Senate and the House of Assembly sitting together.[1]

The Conference recommended that the period of the life of the Senate should be reduced to seven years, and that the property qualification of its members should be discontinued. Much discussion took place as to the advisability of making the new Senate a continuous body with a division of Senators into classes, each retiring at stated intervals. But this would mean that, even if there were only two classes, only four Senators would be elected for each province at each election—a number which would not

[1] The Conference proposed that the number of the Senate should be one-third that of the Assembly. The House of Assembly at present contains 134 members, and the Senate would consequently contain 44 members. After deducting the 4 nominated and the 32 elected members, 8 would be left for election by Members of Parliament.

allow the proper working of Proportional Representation. The Senate, therefore, was still to be renewed *en bloc* at each election.

General Conclusions.

Some general conclusions can be drawn from the Speaker's Conference.

(1) An elected Second Chamber is likely to demand greater power over money Bills than one which stands on a less representative basis. The Conference recognised this fact and proposed, following the lines of the Australian Commonwealth, to empower the State to send down "suggestions" to the House of Assembly for reductions in money Bills. But in order to avoid the difficulty created in Australia by the indefinite repetition of such suggestions, they were only to be made once, and to fall to the ground if the House of Assembly did not accept them.

(2) The impracticability of creating a Second Chamber of a non-partisan character is illustrated. The delegates of the National Convention hoped to create "a body which would represent the nation as distinct from a political party, a body as free as possible from party passion or even party influence, which would take a calm view and act the part of an impartial

judge undisturbed by the turmoil of party strife." [1] The Speaker's Conference proposed to abandon nomination (except for native interests) and election by the Provincial Councils, by which these results were to be secured, and to substitute direct elections which were certain to be fought on party lines.

(3) The Conference was not asked to deal directly with the powers of the Senate. But an addition to its powers could be secured by raising the number of its members so as to increase its strength in the Joint Sittings in the House of Assembly, by which disagreements between the two Chambers are determined. The Conference, however, decided to retain as nearly as possible the existing ratio by which the numbers of the Senate are one-third those of the House of Assembly.

There is no substantial movement for any increase in the powers of the Senate. Even the changes in its composition suggested by the Speaker's Conference are unlikely to be carried out, as in the discussion on the subject on June 30, 1922, General Smuts showed himself decidedly hostile to any alteration for the next ten years. The lesson of South Africa is impor-

[1] Walton: *The Inner History of the National Convention of South Africa*, p. 163.

tant. It has problems before it fully as grave as those of the other Dominions, and as much need for careful revision of its legislation; but it shows no inclination for substituting for "a house of review," a house which can destroy the Bills of the Lower Chamber.

CHAPTER IX

THE NORWEGIAN SECOND CHAMBER

THE Second Chamber in Norway is of special interest because the principles upon which it is based have been widely adopted in modern constitutions and were included by the Bryce Conference in their proposals for this country. As it cannot be properly appreciated apart from its setting within the Norwegian Constitution, of which no full account has been published in English, this chapter must begin with a description of the latter.

Observers and travellers in Norway have for more than a century been impressed by the democratic structure of the Norwegian Constitution. Its special characteristics arose out of the fact that they were created by a people who, though nominally under royal absolutism, were essentially democratic. For nearly four centuries before 1814 the kingdoms of Norway and

Denmark were united under one King, but the union was mainly a personal one, and Norway had its own laws, its own institutions and its own army. During the Napoleonic Wars their King threw himself on the side of Bonaparte, and at the Treaty of Kiel paid the penalty for this miscalculation by being compelled to surrender the crown of Norway to the King of Sweden. He advised his Norwegian subjects to submit themselves to their new ruler, but they replied that he had no legal right to transfer his authority over Norway to an outsider without the assent of the Nation itself. At the National Convention of Eidsvold—famous in Norwegian history—on May 17, 1814, the present Constitution was promulgated, and Prince Christian Frederick, up till then the King's representative in Norway, was elected to be the King of an independent Norway. After the lapse of some time, which Norway utilised for military preparations, a Swedish army crossed the frontier under Karl Johan Bernadotte to enforce the Treaty of Kiel. But before a fortnight had passed, or any serious action had been fought, the campaign was ended by negotiation. The exact reason for this has long been disputed, but the chief factors were that the Norwegian forces, on land and sea, showed greater power of resistance than

Bernadotte had expected, and in the meantime his diplomatic position was uncertain. Norway's opposition might have taken a long time to overcome; the Allies, especially England, were not sympathetic to her final destruction, and an immediate settlement was important to Bernadotte as the Congress of Vienna was on the eve of assembly. On the other hand, England's blockade of Norway caused serious alarm in the mind of King Christian Frederick. The result of the doubts in both the Swedish and Norwegian headquarters led to the compromise arranged at the Convention of Moss in August, 1814. Norway accepted the Swedish King, but on condition that the Constitution of May 17 should remain unaltered, with the exception of such amendments as were needed to provide for union with Sweden. The Constitution drawn up at Eidsvold thus became the Magna Charta of Norway and has remained the basis of her Government to the present time.

The Rupture with Sweden.

The causes leading up to the separation of Norway and Sweden fall within recent memory. Political and temperamental differences between the two countries created a series of disputes that made the position of their joint King a

difficult rôle to fill. The most serious conflicts eventually arose over the question of the control of foreign affairs. By Article 26 of the Norwegian Constitution the final authority in this sphere was left with the King.[1] As there was no definite provision in the Norwegian Constitution as to how and by whom the King should, in ordinary circumstances, administer Norwegian foreign affairs, the King placed their conduct in the hands of the Swedish Foreign Minister. This arrangement led to objections from Norway, but it was tolerated as long as the Swedish Foreign Minister was the agent of the King. In 1885, however, by a change in the Swedish Constitution, the personal power of the King was curtailed, and the conduct of foreign affairs was vested in the hands of the Swedish Foreign Minister, who was made responsible to the Swedish Parliament. Norway thus found herself subjected in foreign policy to the

[1] Before the King could declare war precautions were introduced to ensure full consideration of such an important issue. A joint extraordinary meeting of the Norwegian and Swedish Ministers had to be held. In this meeting a report had to be read from the Norwegian Government as to the opinion and resources of Norway, and a similar report from the Swedish Government. Each Minister's individual opinion had then to be obtained and placed on record. Finally, the King had the right to decide the question in accordance with what he believed best in the interests of the two countries.

Swedish Parliament, and events gradually developed to the final rupture.

This was brought to a head by the question of the Consular Service. From the beginning of the union there had been a joint Consular Service for both countries. At the time of the rupture, the Norwegian mercantile fleet was three times as large as the Swedish. Sweden had adopted a high tariff system, while Norway was almost a free trade country, with the result that commercial treaties had to contain separate agreements for the two countries. In some instances they had entirely distinct treaties. The control of the consular service was in 1850 vested in the Foreign Minister, and his transformation into a purely Swedish official in 1885 led to the belief among the people of Norway that the interests of Norway were likely to be sacrificed where they clashed with those of Sweden. The Norwegian Parliament accordingly passed a resolution in 1891 demanding the establishment of a separate Norwegian consular service. The dispute that arose from this demand and the numerous attempts that were made to settle it by negotiation continued for fourteen years. It finally reached its climax when, all negotiations having failed, and the King having refused to sanction the Norwegian

Bill, the Storthing, on June 7, 1905, passed the resolution "that the Union with Sweden under one King is dissolved in consequence of the King having ceased to act as a Norwegian King." In August of the same year Prince Charles of Denmark was elected King of an independent Norway by a popular vote, which was at a later stage formally confirmed by the Storthing.

This climax had less effect than might have been expected upon the Constitution. The union with Sweden in 1814 had left the main structure of the Constitution promulgated at Eidsvold untouched, but had merely introduced the few enactments necessary to create the union. The abandonment of the union, therefore, directly affected the latter amendments only, and the original Constitution of May 17, 1814, with slight alterations necessitated by modern developments, still remains the foundation of government.

The Storthing.

The Norwegian Parliament, the "Storthing," is elected by adult suffrage, the vote being given to both men and women of over twenty-three years of age.[1] Proportional representation for all the constituencies was introduced in 1919, and for this purpose the country is divided up

[1] Article 50 of the Constitution.

into constituencies of from three to eight members.[1] The "list" system of proportional representation has been adopted in preference to the method of the single transferable vote usually advocated in this country.[2]

The Storthing contains 150 members. The Constitution has always divided the members between the rural districts and the towns in the proportion of two to one,[3] a proportion which is at present fair to both, as the urban population of Norway has now risen to as much as one-third of the total. The constituencies are separately named in the Constitution, and the difficulty of obtaining the large constituency that proportional representation requires out of the smaller towns is met by grouping all the towns in a county or in two or three neighbouring counties into single constituencies.[4]

The Storthing is elected for three years, and the Constitution does not provide any means of dissolving it within a shorter period.[5] Proposals to adopt the British practice on this subject have been discussed, but the Storthing has

[1] Article 58 of the Constitution.

[2] Circular No. 1 on the Election of the Storthing, 1921, issued by the Department of Justice, gives full particulars of the system.

[3] Article 57 of the Constitution.

[4] Article 58.

[5] Article 71.

hitherto refused to accept them on the grounds that the period between elections is so short as to make a change unnecessary and that the Government's right to dissolve the Storthing might be misused by the Crown. By-elections are rare in Norway, as, in addition to the actual members, deputy-members are elected who take the place of those who fall ill, die, or are permitted by the Storthing to retire temporarily. A person cannot be elected a member of the Storthing except for the constituency in which he resides, but an exception is made in the case of those who have been Ministers, who can be elected for any constituency.[1]

The Royal Veto.

The Constitution has contained from its inception a provision, bold at the time, for giving the King nothing more than a suspensory veto over legislation. The King might refuse to sanction a Bill, but if it was passed unaltered by three Storthings after three successive elections it became law without the assent of the Crown.[2]

This provision led to a number of fierce conflicts

[1] Articles 61 and 63 of the Constitution. [2] Article 79.

between the Storthing and the Crown. King Karl Johan Bernadotte twice demanded that the King should be granted an absolute veto, but on both occasions the Storthing refused any change in the Constitution. The Bill for the abolition of the nobility in Norway, introduced in 1821 after having nearly precipitated a *coup d'état* on the part of the King, was about to be passed by means of this provision when the King gave in and accorded his sanction. In three other instances, the Law of 1842 on Liberty to hold Religious Meetings, the Law of 1882 on the Sale of Farms used by Government Servants, and the Law of 1884 on the Appointment of Police Officers in Rural Districts, the Storthing had to repeat its decision before the King assented to the Bill. On the other hand, there are some instances of the Storthing dropping a Bill which had once been refused royal sanction.[1]

The suspensory veto has not been used since the establishment of a parliamentary Ministry in 1884, except in the case of the Flag Law, and it is unlikely that such an issue will be raised again.[2]

[1] T. H. Aschehoug's *Norges nuværende Statsforfatning*, second edition, vol. ii, p. 165.

[2] The only instance of a Bill becoming law without the King's sanction is the Flag Law of 1898. The Constitution prescribed that Norway should have its own mercantile

Ministers and the Storthing.

The relationship between the Storthing and the Ministry is technically somewhat peculiar. Ministers are appointed by the King. They may attend the Storthing and take part in its debates, but they may not be active members of it.[1] If a member of the Storthing becomes a Minister

flag, while the naval flag should be a Union flag. In 1821 the Storthing decided the form and colours of the mercantile flag, still in use. But the King, on the grounds that the Barbarians would not acknowledge it, forbade its use south of Cape Finisterre, and ordered the Swedish flag to be used by Norwegian merchant ships farther south, while the Norwegian Navy should use the Swedish flag everywhere. After much discontent in Norway over these royal orders, a new flag was given in 1845. In the Norwegian mercantile flag of 1821 was put a "union sign" composed of Norwegian and Swedish colours, while the Norwegian naval flag was also given the colours of 1821 with the "union sign." The Swedish mercantile and naval flags were given the same "union sign" as the Norwegian flags. There was dissatisfaction both in Norway and Sweden with this alteration of the national mercantile flags. But while the Swedish discontent gradually subsided, that of Norway grew, until at last the Storthing passed a Flag Bill prescribing the reintroduction of the mercantile "clean flag" of 1821. The King refused his sanction on the ground that, as Sweden now would not abolish the "union sign," the Swedish mercantile ships would be alone in representing the union by the flag. The Flag Bill was passed by three Storthings after new elections, and in 1898 the Bill became law without the King's sanction.

[1] Article 74 of the Constitution.

he thereby vacates his seat, and his place is taken during his tenure of office by the deputy member. A Minister holding office can, at the general election be elected a member of the Storthing, but he cannot take his seat until he retires from office,[1] the deputy member occupying his seat in the meantime. But in spite of these provisions the position of Ministers is in practice similar to that which they occupy in this country. They are now ordinarily chosen among the leading members of the Storthing from the parties that are in a majority, and they hold office, as in Great Britain, as long as they retain the confidence of the Storthing. Ordinary citizens outside the Storthing can be appointed Ministers without conforming to the British convention and becoming Members of Parliament. The peculiar provision by which Ministers vacate their seats as members of the Storthing in favour of their deputy members is now an anomaly dating from the days before the complete establishment of parliamentary government.

Until the last quarter of the nineteenth century Ministers were appointed by the King without any parliamentary co-operation and were regarded as his agents, although the Storthing never

[1] Article 62 of the Constitution.

hesitated to use its prerogative of having Ministers prosecuted and sentenced for giving the King bad advice. The Bill passed by the Storthing to enable them to take part in its debates was immediately recognised by the King as a democratic innovation aimed at his authority and his sanction was refused. Three consecutive general elections upheld the standpoint of the Storthing that the Ministers should take part in its debates and thus become parliamentary Ministers, and, finally, the whole Ministry which had supported the King were impeached and sentenced to forfeiture of their positions. The Bill was eventually sanctioned and the first parliamentary Ministry, formed by Johan Sverdrup, the great Liberal leader in Norway, was appointed in 1884. Since that time full parliamentary government has prevailed, whether the Ministries have been Liberal, Radical or Conservative.

The Committee System.

The Storthing works by means of a standing committee system of the French type. There are sixteen regular committees, and additional committees are appointed for special subjects. Every member of the Storthing is a member of some committee. The committees consider all

Bills to be laid before the Storthing, whether Government or private Bills, and advise the Storthing how to vote. Committees usually ask the Minister concerned with the subject under consideration to participate in its discussions and give information. The committee system leads to a very minute examination of government proposals and to strict supervision of each Minister. But it is complained that, as the Storthing usually approves what the committee approves, questions are settled outside the public arena, and the position of the Ministers as responsible leaders is weakened. There are frequent assertions that on questions concerning railways, the post, telegraph and telephone services, canals and roads, pressure is exerted by the committees on behalf of sectional interests. These criticisms are the same as those heard in France and other countries with a similar procedure, but there is no proposal to abandon the system.

The Second Chamber.

The original draft of the Constitution of 1814 proposed the creation of a Second Chamber of privileged type and of great strength.[1] The

[1] It provided that the Second Chamber should be elected by and among the Members of Parliament in such a way that the representatives coming from each province (*stift*)

Constituent Assembly, however, rejected this proposal, and instituted the present system. Its special interest is due to the fact that for over a century it has been based upon the principle—now being widely followed—of the election of a Second Chamber by the Members of Parliament themselves. When a new Storthing has been chosen it elects from among its own members one-fourth to constitute the Second Chamber, the "Lagthing." The remaining three-fourths constitute the First Chamber, the "Odelsthing." This election is the first task of a new Storthing to be carried through immediately after the election of its President and Vice-President. The next task is for the two "Things" each to elect their own President and Vice-President, and it is not until this has been done that the Storthing is duly constituted, and the Speech

should elect a certain number from among themselves as members of the Second Chamber (*Lagmandsthing*). No member was to be elected to the Second Chamber unless he possessed landed estates of a certain value or a certain annual income. The president of the Second Chamber was to be appointed by the King. The members of the Second Chamber were to sit for six years, while the period of life of the rest of the Parliament was to be only two years. Every second year one-third of the Second Chamber was to retire. Practically every matter dealt with by Parliament was to be carried through both Chambers, and the opposition of either could prevent its passage.

from the Throne delivered.[1] The Norwegian Parliament thus contains three assemblies—the Lagthing, the Odelsthing, and the Storthing *in plenum*—each with its own President and Vice-President. When the Lagthing and Odelsthing are deliberating separately, the Odelsthing meets in the Storthing Chamber, while the Lagthing has a room of its own. Although a double discussion is thus provided for, the cases in which the Storthing acts as two separate assemblies are severely circumscribed. The principal functions of the Storthing can be summarised as follows:

1. Ordinary Legislation.
2. Financial Legislation and Control.
3. Control of the Executive by means of the elaborate machinery that will be described later.

[1] "The Storthing shall elect from among its members one-fourth part, which constitutes the Lagthing; the remaining three-fourths form the Odelsthing. The election shall take place at the first ordinary Storthing that meets after a new election, and thereafter the Lagthing shall remain unchanged during all such Storthings as meet after the same election, except in so far as any vacancy which may occur among its members has to be filled by special election.

"Each Thing shall hold its meetings separately, and elect its own president and secretary. Neither of the Things shall hold meetings unless two-thirds of its members are present" (Article 73 of the Constitution).

4. Naturalisation of Aliens.
5. Alterations of the Constitution.[1]

The only case in which the Storthing acts in two Chambers is the first. The subordinate part played by the double Chamber device is illustrated by the provisions for alterations in the Constitution. Bills for this purpose were held by the framers of the Constitution to need special precautions against hasty decisions. But these precautions were secured not by means of a Second Chamber but by ensuring special care from the Storthing acting as a Single Chamber. Such Bills must be brought before the opening session of a newly elected Storthing and cannot be carried until its period of office has expired, a general election has been held, and a new Storthing has been elected. The Bill can then only be passed if it secures the assent of two-thirds of the members.[2]

The secondary part played by the Lagthing will now be evident. Even in the case of the Bills that come before it, its powers are strictly limited. It cannot initiate any legislation. All Bills must be introduced into the Odelsthing. From there they go to the Lagthing, which may either approve or reject them. Its rejection of a Bill usually takes the form of amendments,

[1] Article 75 of the Constitution. [2] Article 112.

although there are some instances of total rejection. A Bill which thus fails to pass the Lagthing goes back to the Odelsthing. If the Odelsthing accepts all the Lagthing's amendments or acquiesces in its rejection of a Bill, the difference between the two Chambers of course comes to an end. If, however, it refuses to do so, the Bill goes back to the Lagthing, which now discusses it for the second and last time. If they still refuse to pass the Bill it goes finally to the Storthing *in plenum*, where—without any debate—it is put to the vote and a two-thirds majority is needed for its passage. Three days must elapse between each discussion.[1]

One would have expected the Constitution to define with care the distinction between the

[1] "Every law shall first be proposed in the Odelsthing, either by its own members, or by the Government through a Cabinet Minister.

"If the proposal is there accepted, it is sent to the Lagthing, which either approves or rejects it, and in the latter case sends it back with comments appended. These are taken into consideration by the Odelsthing, which either drops the Bill or again sends it to the Lagthing, with or without alteration.

"When a Bill from the Odelsthing has twice been laid before the Lagthing and has been a second time rejected and returned by it, the whole Storthing shall meet and dispose of the Bill by a majority of two-thirds.

"There must be an interval of at least three days between each of these deliberations" (Article 76 of the Constitution).

legislation requiring the Single and the Double Chamber system, in the same way that the British Constitution lays down the means of distinguishing ordinary Bills from money Bills.[1] No such expressed distinction is to be found, but parliamentary tradition of the last hundred years has decided the question, so that disputes are very infrequent. In the case of finance, the practice has been established that the annual budget is voted by the Storthing as a Single Chamber, while the permanent rules and regulations for taxation are passed through the two assemblies separately. The general tendency of the practice that has been built up is to restrict the two Chamber system to the strictest limits that the Constitution permits.

The Results of the Norwegian System.

The practical working of these provisions can now be summarised.

1. Disagreements between the two Chambers are rapidly settled. The authority of the Lagthing rests not upon any power of delay, for this can only occupy a few days, but upon the need of a two-thirds majority for a Bill that is in dispute.

[1] Parliament Act, 1911, s. 1.

2. Disagreements on issues of political principle do not occur. Since the Lagthing is elected by the Storthing it reflects its opinion, and by an understanding similar to that on which committees are constituted in the House of Commons, parties are represented in the Lagthing in rough proportion to their strength in the Storthing as a whole. The Lagthing is not intended to enter into political disputes with the Odelsthing, and as the dominant party or parties have a majority in both chambers, such conflicts do not arise. *Disagreements take place and the decision* of the Storthing *in plenum* is frequently invoked, but they are on committee points of practical rather than political importance, and do not arouse party feeling.

The members selected for the Lagthing are on the whole of the same type as those who do most of the committee work in the House of Commons—practical men with experience in agriculture, industry or local government—while those with more political initiative are retained in the Odelsthing.

The Control of Executive Policy—Domestic and Foreign.

The control of the Storthing over executive policy, particularly in foreign affairs, was greater

than in any other European country before the war. For this control Norway reverts to the single-chamber system, but in this case the single chamber is the Odelsthing and not the Storthing as a whole.

The Constitution enacts that the minutes of the Cabinet and all public reports and documents must be laid before the Storthing and that alliances and treaties into which the King has entered must also be communicated to it. For this purpose the Odelsthing is the acting assembly and appoints a special committee—the Committee of the Protocol—which discusses with scrupulous care the cabinet minutes and the other documents submitted to it. For the control of foreign affairs a remarkable system has been developed. Matters which the Council of State wishes to keep private or secret articles of treaties are laid before a committee of nine members chosen by the Odelsthing from among themselves. These members are acquainted with every diplomatic step that the Government takes and no secret can be constitutionally kept from them. If anything appears to be wrong in the eyes of a single member he has the right to bring it before the Odelsthing itself.[1] The debate, on such

[1] "To the Storthing shall belong the following powers and duties:

a question in the Odelsthing usually takes place behind closed doors, and the standing orders of the Storthing lay it down that members of the Odelsthing are bound to preserve secrecy with regard to the discussion unless the Odelsthing by resolution decide otherwise.[1]

The Lagthing as a Court.

The Lagthing has certain judicial functions of the same kind as are exercised by a number of other Second Chambers. Its members, in conjunction with the High Court of Justice, constitute the Riksret (the constitutional Court of the Realm)

"1. To have laid before it the minutes of the Cabinet and all public reports and documents; the minutes of diplomatic matters and of matters concerning military and naval command shall, however, if they have been decided to be kept secret, be laid before a committee consisting of at most nine members elected among the members of the Odelsthing, and may also be put before the Odelsthing, if a member of the said committee proposes that the Odelsthing shall express its opinion or that prosecution before the Riksret (constitutional High Court) shall be instituted.

"2. To have communicated to them the alliances and treaties that the King on behalf of the State has entered into with foreign Powers; in respect of secret articles, which, however, must not be in antagonism to the public articles, the same rules apply as are prescribed for matters that have been decided to be kept secret" (Article 75 of the Constitution).

[1] See also the British Command Paper, 6102 (1912).

which tries cases of impeachment brought against members of the Council of State, of the High Court of Justice, and of the Storthing for crimes committed in the exercise of their official duties. The Odelsthing is the body which puts forward the accusation.[1] In the early days of the Constitution, when Ministers were suspected of being too servile towards the King, they were frequently impeached and sentenced to fines. Down to 1845 there were six such cases. Then there was an interval of thirty-eight years when no instance occurred. But in 1883 there was a wholesale impeachment against eleven Ministers who had advised the King not to accept the Storthing's proposal to admit Ministers to participate in their debates. The sentence included fines and forfeiture for ever of their positions as Ministers.

Since the establishment of parliamentary Ministries in 1884 there has been no instance of any Riksret case against Ministers, as there are now simpler means of getting rid of them.

Does Norway possess a Second Chamber?

It is significant that the Norwegian Constitution does not use the term "chamber," but the word "section" to indicate a division of much less

[1] Article 86 of the Constitution.

importance.[1] The best summary of her reply to the Second Chamber problem is that she possesses a one-chamber system with the rudiments of a two-chamber system. This is the broad conclusion reached by the chief Norwegian Professors of Law. Professor Bredo Morgenstierne sums up the position as follows: "The most prominent feature of our National Assembly, in contrast to most others, consists in the fact that the Storthing is chiefly, though—as will be shown—not plainly organised as one Chamber."[2] "It is a modification, not of a two-chamber system, but of a one-chamber system."[3] "At most it can be spoken of as a one-chamber system with some few traces of the two-chamber system."[4] He also points out that the Storthing assembles and is dissolved as one Chamber and that the division in two sections is not an external but an internal act.[5] His predecessor, Professor T. H. Aschehoug, in his classic work on the Constitution of Norway, expresses a similar opinion: "From the hands of the electors the Storthing issues as a Single Chamber. The fact that it is divided by itself

[1] "The people exercise the legislative authority through the Storthing, which consists of two sections, a Lagthing and an Odelsthing" (Article 49 of the Constitution).

[2] Bredo Morgenstierne: *Laerebog i den norske Statsforfatningsret*, second edition, pp. 166, 168, 169.

[3] *Ibid.* [4] *Ibid.* [5] *Ibid.*

into the Odelsthing and the Lagthing cannot create any great antagonism. Generally the fundamental political opinion entertained by the majority of the Storthing will have the mastery in each of its sections. Moreover, the importance of this division is decreased in two ways. In the first place, many important matters are dealt with by the whole Storthing alone. It is only law Bills which are dealt with separately in the Odelsthing and the Lagthing. In the second place, even such matters must be laid before the whole Storthing in cases where the sections do not agree." [1]

The present system has been tested for 108 years, sometimes under very difficult political circumstances, to the entire satisfaction of the nation. It has been an important factor in preserving national unity by preventing the Storthing from being divided into two opposing sections. The fact that the Storthing as a Single Chamber always presented a united national front against a Union King, who in critical situations was governed by Swedish opinion and interests, saved Norwegian independence. Now that the difficulties created by the Union have ceased and the royal power has been strictly

[1] T. H. Aschehoug: *Norges nuværende Statsforfatning*, second edition, vol. i, p. 319.

defined no party shows any desire to have a Second Chamber of the type usual in other countries. On the contrary, the Norwegian people appear to be proud of the system which, if not first created, was first developed, in Norway by long constitutional practice and now is being imitated by other nations.[1]

[1] T. H. Aschehoug, *Norges nuværende Statsforfatning*, vol. i, p. 319, says that the Norwegian system has its origin in the Constitution of the Batavian Republic of 1798.

CHAPTER X

A. THE SENATE OF THE IRISH FREE STATE. B. THE SENATE OF NORTHERN IRELAND.

A. The Senate of the Irish Free State.

The Irish Free State gives us an example of the extent to which the character of a nation can express itself in its form of government. It remains to be seen whether a number of the provisions of the new constitution will be practicable, but they are a product of an imaginative ingenuity which has succeeded in gathering up and tying together a large proportion of the new political ideas that are afloat in the world.

The constitution is contained in (1) the Irish Free State (Agreement) Act, 1922, which embodies the Treaty made between Great Britain and Sinn Fein, and (2) the Irish Free State Constitution Act, 1922, which gives the force of law to the new constitution that, in accordance with the terms of the Treaty, Southern Ireland drew up for herself.

By the Treaty the relationship between the Imperial Government and the Irish Free State is to be determined by "the law, practice and constitutional usage" which governs our relationship to Canada. This signifies that Southern Ireland has full control over her domestic legislation and that although the Government may reserve a Bill or refuse the assent of the Crown to it, this power will only be used if Imperial interests are affected, uniformity is required, or the special clauses in the Treaty safeguarding religious liberty are broken.

The Free State Parliament contains two Houses, the Chamber of Deputies (Dail Eireann) and the Senate (Seenad Eireann). The Chamber of Deputies is elected for four years, but in accordance with British practice it may be dissolved before its term of life is concluded. The vote is given to men and women of over 21 years of age. The elections are on the system of proportional representation and, in consequence, large constituencies are to be created, each returning sufficient members to make proportional representation practicable.

The Constitution of the Senate.

The picture of the Senate that the framers of the constitution had in their minds has been

described by Mr. Darrel Figgis, the chief architect of the constitution. "What may be called a Senatorial Person is a recognised factor in the history of all nations. In the push and jostle in the entry to the first House such a Senatorial Person is likely to be set aside even if he or she be inclined to mingle in the fray. He is consequently lost to the councils of the nation. How shall a place be found for him or for her?"[1] The Senate consists of sixty members. They are elected for twelve years, one fourth retiring every three years, so that an election for fifteen members is to be held every third year. The Senatorial Persons of whom the Second Chamber is to be composed, are defined in the constitution as "citizens who have done honour to the nation by reason of useful public service or . . . who represent important aspects of the nation's life." Mr. Darrel Figgis, answering the question as to how such persons are to be secured, truly observes that "no other nation has answered it as it is answered in the constitution of the Irish Free State." Senators are to be elected by the direct popular vote of men and women over thirty years of age. The election is to be by proportional

[1] *The Irish Constitution*, by Darrel Figgis, p. 27. Mr. Darrel Figgis was acting chairman of the Constitutional Committee.

representation and the whole of the Irish Free State is to vote as a single constituency for the fifteen members that each election usually returns. But the electors are not to have an entirely free choice, for their election is to be limited to a panel consisting of (*a*) Ex-Senators who wish to be candidates for re-election; and (*b*) forty-five additional candidates, of whom thirty are to be nominated by the Chamber of Deputies and fifteen by the Senate, both Chambers voting on the system of proportional representation.[1] The three devices for selecting Senators, of proportional representation, direct election, and election by Members of Parliament are thus all to be found in the Irish Constitution. Each of them has been met among the constitutions that have been described, but the special combination of them that the Irish Free State has evolved certainly contributes a new experiment to the Second Chamber problem.

As these provisions cannot be carried out until the first Senate has been constituted, special machinery had to be devised to bring the first Senate into existence. Thirty of its members

[1] Casual vacancies arising from death, or resignation, are to be filled up by a vote of the Senate, and the member thus chosen is to hold his seat for the remainder of the term of office of the original member.

were nominated by the President, the remaining thirty were elected by the Chamber of Deputies voting by means of Proportional Representation, and provisions were laid down for the retirement of fifteen members selected by lot, at intervals of three years.

The Powers of the Senate.

The powers of the Senate are determined by provisions of a more usual type. In the case of a disagreement between the two Chambers on a Bill, an interval of two hundred and seventy days must elapse from the time that the Bill was first sent to the Senate, but if it has not been carried by the end of this period, it is deemed to be passed. In the case of money Bills, the period of delay is only twenty-one days.

The difficult problem of what authority is to decide in cases of dispute whether a Bill is a money Bill, is answered along the lines suggested for Great Britain by the Bryce Conference. The question is not left for final judgment to the Chairman of the Lower House—as it is in this country to the Speaker—but, on a requisition by two-fifths of the members of either House, is decided by a Committee of Privileges consisting of three members elected by each House, with a Senior Judge of the Supreme Court to act as

Chairman and to have a casting vote in case of an equality of votes.

The Senate, therefore, is a body of very restricted authority, whose chief powers arise from a right to insist upon a limited period of delay. But it possesses, in addition, an indirect and unusual power, derived from its function as a part of the machinery for the Referendum, the next experiment that the Constitution contains.

Any Bill may be suspended for ninety days on the demand of two-fifths of the Chamber of Deputies or the majority of the Senate. This delay is intended to allow time for a demand for the Referendum to be formulated, if a sufficient desire exists. If such a demand is put forward by three-fifths of the members of the Senate, or by one-twentieth of the voters, the Bill cannot pass unless supported by a majority of the voters at the Referendum. These provisions do not apply to money Bills or to Bills declared by both Houses to be necessary to the public peace, health or safety.

A complete view of the position of the Senate must take into account the special provisions laid down for Bills which propose to alter the Constitution. Such measures may be carried by the ordinary process during the first eight years, but, at the end of that period, their passage

through the two Chambers is followed by a compulsory referendum at which an ordinary majority is not sufficient, but (1) a majority of voters on the register must record their votes, and (2) the Bill must be supported by either two-thirds of the votes recorded or a majority of the voters on the register.

The operation of these various provisions can only be tested by experience, but certain considerations suggest themselves. The Free State Constitution is well protected against the danger of the passage of the Bills to which the people are opposed. All of them can be submitted to a referendum if any substantial movement of public opinion manifests itself against them, and after the first eight years no change can be made in the Constitution without a compulsory referendum of a type which ensures that much more than a bare majority is needed for the passage of a proposal. Compared to such provisions as these, the powers of the Senate are very much restricted and consist chiefly of the right to ensure two hundred and seventy days of discussion and delay.[1] But the chief question

[1] Although the Senate possesses a further power of demanding a Referendum by a two-fifths majority, this can be equally effected by one-twentieth of the voters. Mr. Darrel Figgis argues that to obtain the signatures of

which suggests itself is, whether with such limited functions a much less laborious process of selecting the Senate would not have been preferable to that which the Constitution lays down. It is not justifiable to involve the whole country in an election every three years in order to provide a Second Chamber whose powers render it a minor factor in the Constitution.

B. The Senate of Northern Ireland.

The constitution of Northern Ireland rests upon the Government of Ireland Act, 1920, modified by certain changes contained in the Irish Free State (Consequential Provisions Act, 1922). The Act of 1920 established two Parliaments for Southern and Northern Ireland, but as the provisions for the Southern Parliament have been nullified by the Treaty with Sinn Fein and the establishment of the Irish Free State, only those portions of the Act which refer to Northern Ireland are in force.

such a proportion of the voters will prove "an almost impracticable and certainly an extremely difficult task" (*Irish Constitution Explained*, p. 34). This will not be so if the Irish exhibit in their own country the faculty of political organisation which they carry to every other country. Under the Temperance Scotland Act, 1913, one-tenth of the electors must sign the requisition for polls on local veto, but no difficulty has been found in obtaining the necessary signatures.

The House of Commons of Northern Ireland consists of fifty-two members, and is elected for five years by the system of Proportional Representation.

The Senate came into being under peculiar circumstances, and the reasons for its existence cannot be understood without an explanation of the events that led to its creation. Before the Act was introduced the Cabinet Committee that was in charge of it spent a great deal of time in discussing the Second Chambers for the two Parliaments. But, as Mr. Bonar Law frankly told the House of Commons, they were completely baffled by the problem,[1] and proposed that both Parliaments should contain a Single Chamber only. But the advocates of the Protestant minority in Southern Ireland, who formed a strong and active group in the House of Commons, regarded a Second Chamber as necessary for the protection of Protestants, and extracted a pledge from the Government that they would introduce proposals for a Senate before the Bill had left the House of Commons.[2] When, however, the Government plan appeared, it became evident that the problem still defeated them, for they merely proposed that the Council of Ireland

[1] House of Commons Debates, November 8, 1920.
[2] House of Commons Debates, May 18, 1920.

should frame a scheme for Second Chambers at a future date, after the Parliaments had been established. The Protestant advocates had to be content with this in the House of Commons, but in the House of Lords, where party discipline is more easily disregarded, the subject was again taken up, a series of defeats were inflicted upon the Government and a fully equipped Second Chamber was established for Southern Ireland.[1] Its features do not concern us, as it has been superseded by the Senate of the Irish Free State, but while the main assembly has disappeared, its corollary, the Senate of Northern Ireland, still lives on.

There was no substantial independent demand for any Senate in Northern Ireland. This is surprising, as the existence of a religious minority is as evident there as in Southern Ireland, and it is frequently predicted that when once the Home Rule issue which divided the Protestant and Catholic workers is disposed of, Belfast and its surrounding districts are destined to form one of the strongest Labour centres in the United Kingdom.[2] Although both factors strengthen

[1] House of Lords Debates, December 1, 1920, and December 6, 1920.

[2] See Mr. Bonar Law's speech, House of Commons Debate, November 8, 1920.

the usual arguments by which Second Chambers are supported, Sir Edward Carson stated in the House of Commons that Ulster preferred the Single Chamber system,[1] and the desire for it in the House of Lords was no stronger. But as it was generally felt that it would not be possible to insist upon a Senate in Southern Ireland without creating a corresponding one in Northern Ireland, a scheme for it had to be devised. Its powers were borrowed from those provided for the Southern Senate, but the provisions for its constitution were delayed until the last moment, and were then inserted in the Bill without a word of discussion in the House of Lords and with only a few minutes of discussion in the House of Commons.[2] It is a striking evidence of the pervasive influence of dominant constitutional ideas, that although the Northern Irish Senate was created in this hasty and inconsequential manner, it embodies the most modern experiments that we have examined.

Constitution and Powers of the Senate.

The Senate of Northern Ireland consists of the Lord Mayors of Belfast and Londonderry and

[1] House of Commons Debates, November 8, 1920, and December 16, 1920.

[2] House of Lords Debate, December 6, 1920, and House of Commons Debate, December 16, 1920.

of twenty-four members elected by the House of Commons by means of Proportional Representation. They are elected for eight years, one half retiring every four years. The Northern Irish Constitution, therefore, carries out more completely than any other in the British Empire, the principle of electing the Upper House by members of the Lower House.

The powers of the Senate are similarly laid down along lines which recent constitutions have rendered familiar. In the case of disagreement between the two Chambers over ordinary Bills there is a delay of one session. If the disagreement continues in the next session the Lord Lieutenant may convene a Joint Sitting of the members of the two Houses in which the issue is decided by a majority vote, where the House of Commons with fifty-two members will have twice the weight of the Senate with twenty-six members. In the case of money Bills the Senate is, according to the usual provisions, allowed the right to reject them, but not to amend them, but if the rejection is not accepted by the House of Commons the Joint Sitting takes place in the same session.

The First Senate was elected on June 7, 1921.[1]

[1] See Northern Ireland Parliamentary Debates, June 7, 1921.

CHAPTER XI

THE BRYCE CONFERENCE

THE "Conference on the Reform of the Second Chamber," set up by the Prime Minister in 1917, consisted of thirty members, drawn from both Houses of Parliament and from all parties, with Viscount Bryce as the Chairman.[1] Its discussions cover a survey of practically every device proposed for the solution of the Second Chamber problem. The Conference published no evidence or detailed record of its proceedings. But I have had access to its minutes and memoranda which, though I have included nothing of a confidential nature, afford the material for the following chapter.

[1] The Conference was suggested by a similar Conference which had previously been set up in order to reach a compromise upon the question of Women's Suffrage. This body arrived at a series of unanimous conclusions which were embodied in the Representation of the People Act. The hope that this unique achievement might be repeated on the Second Chamber problem led to the Bryce Conference.

The thirty members of the Conference included all opinions, from the leading champions of the House of Lords in the contest over the Parliament Act to advocates of the Single Chamber system. The hope that this body would reach unanimous conclusions was soon seen to be unattainable. No report, therefore, was issued, but a letter was written by the Chairman, Lord Bryce, to the Prime Minister, indicating the course of the discussions, and stating that, while conclusions had been reached on many points, they were those of a majority only.[1] Individual members, therefore, were not bound to all the recommendations, although prepared to acquiesce in the scheme as conveying what proved to represent the general view of the Conference as a whole.

Although the Conference itself was unable to follow a fully systematic order in its discussions, the development of opinion within it can be best followed by examining first the proposals for the constitution of the new Second Chamber and then those for the powers which this Chamber is to exercise.

Constitution of the Second Chamber.

At the beginning of the discussions, it was agreed that the existing House of Lords should select only a minority of the Second Chamber,

[1] Cd. 9038.

and that, in order that the remainder of the Chamber should not contain any element of privilege, no property qualification should be needed either for its members or its electors. The discussion as to how the bulk of the Chamber should be selected opened with suggestions, which included, as might be expected, all the main schemes that exist either in the Dominions or in foreign countries.

These suggestions fall into four main classes :—

1. Direct election by large constituencies on the plan of the Australian Senate and that of the new Legislative Council of New Zealand.
2. Nomination—for a small proportion of the Chamber—in order to secure the presence of persons of eminence not actively concerned in party politics.
3. Election by Local Authorities grouped together in geographical areas, on some such plan as that suggested by the French Senate.
4. Election by the House of Commons.

The first of these plans—that for direct election—receded into the background at an early stage of the discussions. The first principle that was generally accepted by the Conference was that the Second Chamber should not possess co-equal powers with the House of Commons, and in particular should not exercise direct control over Executive Government with the power of making and unmaking ministries. These principles ruled

out a directly elected Second Chamber, which, it was felt, would tend to become a rival of the House of Commons and be able logically to claim co-ordinate authority. It was also urged that large constituencies would add to the expense and labour of elections. It therefore became clear, before half the sittings had been held, that a majority of the Conference was opposed to all proposals in this direction.

The second suggestion—that of nomination—for at any rate a small element of the Chamber—had at one time the support of a clear majority of the Conference, in the hope that distinguished persons not closely connected with politics could in this way be selected. But it was pointed out that literary and scientific distinction do not specially qualify their possessors for the exercise of political power, and that, as such nominations would be made on the advice of the Prime Minister, they would be mainly utilised to reward party services.[1] This proposal, therefore, disappeared, and the Conference turned to the two remaining methods, both involving indirect election.

Suggestions for election by Local Authorities

[1] This opinion is fully confirmed by the experience of nomination in Canada and New Zealand. See cc. iii, iv and vi.

had been before the House of Lords for a generation.[1] The main scheme in which this proposal came before the Conference was that the election for each area should be in the hands of electoral colleges consisting of representatives from the local authorities of that area, on a plan somewhat similar to that adopted for the French Senate. It was, however, objected that local authorities are not elected with the idea of fulfilling such a purpose, and that to obtrude it into their duties would be to intensify political partisanship on issues which ought to be decided on other grounds. Liberal and Labour members of the Conference pointed out that such a plan would be unfair to them, as County Councils are well known to be conservative assemblies, even in areas where the parliamentary representation is in the hands of the other parties. Behind these contentions was the belief of many members of the Conference, that a Second Chamber so elected would claim to be as representative as the House of Commons, and would attempt to rival its authority. The general result was that the majority of the Conference soon made their opposition to the proposal clear, even in the modified form of

[1] See Lord Rosebery's proposals, House of Lords Debates, March 19, 1888; and Lord Dunraven's House of Lords Reform Bill introduced March 23, 1888.

combination with election by the House of Commons. By a process of exhaustion, therefore, the Conference found itself left with the fourth plan, on which its main scheme was finally based.

The election of the Second Chamber by the members of the first is the chief contribution to the solution of the problem of the relation between the two Houses which political inventiveness has made during recent years. It was suggested by Lord Rosebery to the House of Lords in 1888 as a possible means of electing a small number of members.[1] Its merits are that it creates a Second Chamber which has no claim to become a rival to the first, and that it avoids the expense, labour and confusion of a second series of popular elections. On the other hand, an equally obvious result is that it is certain to be elected on party lines, to reflect the prevailing composition of parties in the Lower House, and to be used largely as a consolation for politicians who have grown tired or who have been defeated in the election for the more popular Chamber. This partisan character is an inevitable feature of every Second Chamber, however constituted, but it so impressed a number of members of the Conference that a great part of the time of the

[1] House of Lords Debates, March 19, 1888.

Conference was expended in attempts to discover some device by which it could be corrected.

The most obvious method was to put the election into the hands of some further body, which, while representing the general opinion of the House of Commons, would be freer from party influences. The Speaker was first proposed for this purpose, and when this was seen to be impracticable, there was substituted a small Committee of Selection of about twenty members, half to be appointed by the House of Commons and half by the new Second Chamber. The objection to such a proposal—which secured its defeat by the Conference—is that a Second Chamber, mainly chosen by only twenty persons, who would not themselves be directly representative of the electorate, would command so little public confidence, that probably it could not be brought into existence and certainly it could not be given any effective authority. Nevertheless, a certain number of members of the Conference were so convinced of the vital necessity of this provision that they insisted that, in the letter embodying the conclusions of the Conference, their names and opinion should be placed on record.[1]

The Conference thus came finally to direct

[1] They consisted of Lords Lansdowne, Loreburn, Balfour of Burleigh, Dunraven, Sydenham, and Lord Hugh Cecil.

election by the House of Commons; but, in order to prevent the party with a majority from electing a Second Chamber made up of a solid block of its own supporters, it was agreed without dissent that the election should be by Proportional Representation. This, however, would have necessitated that each member of the House of Commons should have had as many votes as there were representatives to be elected, and that he should place in order of preference dozens or even hundreds of names, a task which would not only be impracticably cumbersome, but would enable a very small combination of voters to secure the quota needed to elect a member. To avoid this, the Conference decided, by a substantial majority, to divide Great Britain into thirteen areas, and to vest the election of the representatives for each area in the hands of the members for the House of Commons sitting for constituencies within the area. An additional consequence which follows from this scheme is that the power of the party Whips will be to some extent counteracted by the influences of territorial sentiment.

The Term of Election.

The character of the Second Chamber will be profoundly affected by the length of life for which its members are chosen. Opinions in the Con-

ference ranged from those who wished it to be elected by each House of Commons for the life-time of that House of Commons alone—the plan adopted in Norway—to those who wished it to be elected for twelve years. The objection urged to the first proposal was that the Second Chamber would become no more than a duplicate of the House of Commons, while the opponents of the longer period argued that it would produce a Chamber selected on issues which had long passed from the arena, and which would be out of touch with living public opinion. The proposal for a life of twelve years finally carried the day; and this plan, if it is carried out, will establish the longest-lived Chamber in the British Commonwealth.[1] It was also decided that one-third of its members should be re-elected every four years.

The Existing Peerage.

The question of the retention in the new Second Chamber of a representation from the existing peerage raised the widest divergence of opinion,

[1] A compromise between these two views is contained in the proposal that members of the Second Chamber should be elected for the life of two Parliaments, put forward in the series of articles on "The Liberal Party and a Second Chamber," which appeared in the *Nation* during July and August, 1914.

one section objecting to any such element at all, the other insisting that the House of Lords would not assent to any scheme which did not by this means provide for the maintenance of the historic continuity of the constitution. The final settlement, carried by a majority of the Conference was that one-quarter of the Second Chamber, i.e., eighty-one members, should be chosen from the existing peerage in the first instance, and that this number should by a gradual process be reduced to thirty.

The problem next arose of how this section of the Second Chamber should be elected. Proposals were made that it should be chosen on the same plan as the rest of the Second Chamber, that is, by members of the House of Commons. It was, however, finally decided to vest the election in a joint Committee of ten members, five to represent the new Second Chamber, chosen by the Committee of Selection for that Chamber, and five to represent the House of Commons chosen by the Speaker. It must be noticed that, as the number of peers is reduced from eighty-one to thirty, the places thus left vacant are still to be filled by the Committee of ten, but that their choice is not restricted to the peerage. The final result, therefore, is that one quarter of the new Second Chamber is to be

selected by ten persons who are themselves the product of a process of tertiary election.

The suggestion that representatives of the Dominions should have seats in the Second Chamber was defeated by a small majority, on the grounds that the proposal opened up the wider question of our relationships to the Dominions, which was outside the scope of the Conference.

The proposal that the two Archbishops should sit *ex-officio* as members of the Second Chamber was defeated, but it was agreed—with a minority dissenting—that five Bishops holding Diocesan Sees should be included among the members to be selected from the peerage.

It was decided by large majorities that if the new Second Chamber is to exercise the judicial functions now discharged by the House of Lords, the Law Lords, the Lord Chancellor and those ex-Lord Chancellors who take part in the judicial business of the House should continue to sit *ex-officio*.

Without much discussion and by a small majority, the Conference came to the important decision that no sitting member of the House of Commons should be eligible for a seat in the Second Chamber—thus laying down the opposite principle to that followed in Norway.

The Conference rejected by a small majority the provision common in many Second Chambers, to introduce an age limit of 30 years as a qualification for membership.

On the question of the payment of members of the Second Chamber, it refrained from pronouncing an opinion, but came unanimously to the decision that, if payment were made at all, it should be equal to that of the House of Commons—a surprising conclusion in view of the difference in the amount of time that the work of the two Chambers requires, and one that would probably convert places in the Second Chamber into pensions for retired politicians.

Definition of a Money Bill.

The Conference accepted the principle that the new Second Chamber, like the present House of Lords, should have no power over money Bills. But at this point there arose the question of "tacking" which, while appearing at first sight to be mainly a technical one, profoundly affects the future of social legislation. What is a Money Bill? May a Labour Government carry through a Socialistic programme in a series of money Bills and so defeat the opposition of the Second Chamber? The many hours that the

Conference devoted to this subject indicate the fundamental issues that it raises.

The present position, as it has been left by the Parliament Act, is that the term Money Bill is very strictly defined and that the decision as to whether a Bill comes within that definition is left to the Speaker. This provision of the Parliament Act had been fiercely resisted as it passed through the House of Commons, and the question was again raised at the Conference. Protracted discussion proved that it was beyond the wit of man to frame an inclusive and satisfactory definition of a Money Bill, and the solution of the difficulty was sought by creating a tribunal to whom each case could be referred as it arose. The Judicial Committee of the Privy Council had been frequently suggested as the most suitable tribunal, when the Parliament Act was being debated, and this proposal was repeated at the Conference. But it was argued that the decisions would not involve the legal interpretation of Bills, but their broad political and social effects, and that for such a purpose a parliamentary body was more suitable than a judicial one. The Conference, therefore, decided that a Finance Committee, consisting of about seven members from each House—chosen at the beginning of each Parliament—should take the

place of the Speaker as the arbiter of what constitutes a Money Bill.

This proposal contradicts the experience of generations of Parliamentary life. The complete detachment of the Speaker from political bias is one of the most unquestioned traditions of the British Constitution. This tradition has never been stronger than it is at this moment, and it has already been shown on this question of money Bills. On three occasions the Speaker has refused his certificate to Finance Bills, which, therefore, went up to the House of Lords as ordinary Bills and not as money Bills.[1] It is important to notice that in making his decision the Speaker is not—as he is in other cases—the representative of the House of Commons; but he acts by an independent statutory power, given him under the Parliament Act, for which he is not accountable to the House of Commons. He has maintained this position by refraining from giving any reasons to the House for his decisions to refuse his certificate to Finance Bills. It is grotesque to imagine that a higher degree of impartiality than this will be obtained from a Committee made up of those who are themselves engaged in the conflict upon the Bill which is the subject of their judgment. This becomes more

[1] In the Sessions of 1911 and 1914–16.

evident if we examine more closely what this Committee is to do and how it is to be constituted. The Speaker at present decides whether a Bill comes within the terms of certain definite words laid down in the Parliament Act, a close and exact question to answer. But the Conference laid it down that the standard by which the new Committee is to judge is by the " broad social and political effects of the Bill," a vague and roving question that invites the introduction of political partisanship.

Powers of the Second Chamber.

When the Conference turned to the second of the chief issues that had to be decided—the general powers which the Second Chamber was to wield—the most acute divergencies of view disclosed themselves. The widest cleavage lay between the supporters of the Joint Sitting of the two Chambers and those of the Referendum, as the final means of determining a disagreement between the two Houses. The opponents of the Joint Sitting urged that the House of Commons would far outnumber the House of Lords, and that, as the result of a Joint Sitting could usually be seen in advance, those who knew that they had the ultimate majority behind them would merely smother all opposition. The

Referendum was opposed upon the ground that it could not be confined merely to the settlement of disputes between the two Chambers, but that, when once introduced, it must play a dominant part in the Constitution. Its suitability for such a part was attacked by the usual arguments which have been used in previous controversies on this proposal.

The failure of either section to convince the other led to a situation in which at one time the only solution seemed to be that both sides should state their views in the report of the Conference without any conclusion being reached. The final result was, however, that, after informal discussions, both proposals disappeared, and the Conference came to an agreement on the third device which had been suggested for the settlement of disputes, that of a "Free Conference." The term "Free Conference" suggests a body which confers, that is discusses and negotiates, but has no final or binding authority. It is an accurate description of the proposal in its first form, but, as the proposal developed, it was so stiffened and magnified—largely as the result of the compromise by which the proposals for the Joint Sitting and the Referendum were both dropped—that the term is quite misleading as a definition of the scheme that eventually emerged.

Under this scheme the proceedings of the Free Conference are to be secret. It is to consist of sixty members, thirty chosen by each Chamber, twenty members being selected for the lifetime of the Parliament, and the remaining ten *ad hoc* for each particular Bill. The representatives of each House are to be chosen by the Committee of Selection of that House.

A Bill on which the two Chambers cannot agree will come before the Conference at the request of either Chamber. If it is rejected by the Conference it will die, but it may be anticipated that in most cases it will, in some form or another, come back out of the Conference to the two Chambers. The only choice they now have is to accept or reject the Bill as a whole, a point of the scheme which is fundamental, for it means that the House of Commons has finally lost control of the Bill in the form in which it was passed, and now only has before it the Bill as it has been altered by the Conference. If now both Houses either accept or reject the Bill, the matter is concluded. But if the disagreement continues and one House accepts the Bill while the other rejects it, there is to be a delay of one session, at the close of which the Free Conference takes it up again. If the Free Conference fails to report it back in the same form as before, it dies.

But, if the Free Conference repeats it without amendment by a majority of not less than three (to ensure a substantial preponderance of opinion in its support) it then goes back to the two Houses once again. If, on this occasion, the House of Commons accepts it, it becomes law whatever may be the attitude of the Second Chamber.

Conclusions.

The scheme is obviously a very complicated one. The first objection to it is that it lacks the simple intelligibility needed in democratic government, but its essential proposal is clear. The Free Conference can reject the Bill or can change it into any form that it decides. The House of Commons has no power in case of its rejection, and, if the Bill has been altered, even in its vital principles, must take it as it is or lose it altogether. The power of a Free Conference is, then, in the case of disputed Bills, as great as that of the House of Commons itself.

The political inventiveness of Lord Bryce and his colleagues has added one more to the possible devices by which a dispute between two Chambers can be determined, i.e., the creation of a Third Chamber which, when disagreement arises, becomes greater in power than the Second and equal in power to the First. But this fact lays

bare the weakness at the heart of the scheme. The essential requisite, without which no chamber could be given such tremendous powers, is that it should have an undoubted representative capacity. But the Chamber proposed is removed from the electorate by so many intermediate stages that its representative capacity is attenuated to a mere shadow. One half is to be elected by the House of Commons; the other half is chosen by the House of Lords, of which one quarter of the members are to be selected by only ten persons, themselves the product of tertiary election. Of the remaining three-fourths one-third will be the product of a secondary election about ten or twelve years old; another third of a similar election six or eight years old; and the remaining third of a similar election by a recent House of Commons. Finally, this Third Chamber is to sit in secret. A body of this kind, far removed from contact with the people, publishing no division lists, but debating behind closed doors, might be suitable as a revisory assembly with definitely restricted powers of suggestion; but the proposal to set it up to defeat the House of Commons is impracticable in a democratic state.

The explanation of such a proposal is to be found by tracing its development through the

discussions out of which it grew. When the constitution of the Free Conference was finally carried it had not been decided that it was to have any binding authority. The amendments which transformed it into a new Chamber of enormous strength were only made at the last moment. But no further examination was made of its constitution, which remained as it had been before the new powers had been added. Thus, on a constitution devised for a body of severely limited authority, there was finally erected a Chamber of unusual strength founded upon a basis on which it is quite impracticable to hope that any such Chamber can stand.

In dealing with the constitution of a Second Chamber, the Bryce Conference has made a signal contribution to the subject, by adopting the principle of election by the Lower House. But on the problem of its powers it has made the mistake which has beset Second Chambers in the past, of attempting to force it into a rôle far more ambitious than that of a simple revisory assembly. This accounts for the fact that the first half of its report is so clear-cut, while the latter half is unreal to the point of being fantastic.

CHAPTER XII

THE GOVERNMENT RESOLUTIONS OF 1922 AND CONCLUSIONS

THE Bryce Conference was followed by the appointment of a Cabinet Committee to examine the subject on behalf of the Ministry. The Cabinet adopted certain proposals which were put before the House of Lords as a series of Government resolutions on July 19, 1922, and debated for several days. As this is the latest official scheme for dealing with the subject, an examination of it is necessary.

The scheme is contained in five resolutions, of which the first three define the plan on which the new Second Chamber is to be built up. They are as follows :—

"1. That this House shall be composed, in addition to Peers of the Blood Royal, Lords Spiritual, and Law Lords, of :—

(*a*) Members elected, either directly or indirectly, from the outside.

(*b*) Hereditary Peers elected by their order.

(*c*) Members nominated by the Crown, the numbers in each case to be determined by Statute.

"2. That, with the exception of Peers of the Blood Royal and the Law Lords, every other member of the reconstituted and reduced House of Lords shall hold his seat for a term of years to be fixed by Statute, but shall be eligible for re-election.

"3. That the reconstituted House of Lords shall consist approximately of 350 members."

The scheme met with a frigid reception in the House of Lords. The objections to it from the Conservative point of view consisted of two main criticisms. The first is evident if the resolutions are compared with the discussions of the Bryce Conference. They are framed so as to avoid a reply to any of the questions that must be answered by all proposals to reform the constitution of the House of Lords. How are the members elected from outside the existing peerage to be chosen? The answer is that they shall be elected "either directly or indirectly." This reply includes any or all of the plans laid before the Bryce Conference and leaves the question where it was before the Conference began. What proportion are the members elected from the existing peerage to bear to those elected from outside? To this question, upon which the whole character of the assembly depends, the resolutions give no reply. For

how long a life is the Second Chamber to be elected? The answer is "for a term of years to be fixed by Statute." These are feeble results after fifty meetings had been held by the Bryce Conference, House of Lords Reform had appeared three times in the King's speech, and a special Cabinet Committee had sat upon the problem for months.

The remaining subject with which the resolutions deal is the power which the newly constituted Second Chamber is to possess when it comes into conflict with the House of Commons. The Bryce Conference gave the greater part of its time to lengthy discussions upon this subject and finally arrived at a novel solution based upon a series of Free Conferences between the two Houses. The Government passed this scheme over and decided that, for ordinary measures the Second Chamber should retain the powers that it at present possesses under the Parliament Act. For these measures it would have the power arising from the fact that if it disagrees with the House of Commons over a Bill, that Bill can only become law if it is passed by the other House in three successive sessions, covering a period of at least two years.

The deep disappointment that this provision created in the House of Lords constituted the

second ground of attack. The Peers who were most active in the Bryce Conference had throughout regarded the question of the powers to be granted to the new House of Lords as the major issue in the whole problem. The solution of this question reconciled them to proposals for a drastic revision of its constitution. The Government, however, proposed to carry through the revision of the Constitution, but to evade altogether dealing with the problem of the power of the reconstituted chamber. The resentment at this method of treating the subject was summed up in Lord Selborne's observations. "If real power, such as Lord Bryce's report had laid down as essential were given to this House, I would vote for great and drastic reforms in its constitution; but if we are to be put off with a sham, then I will have nothing to do with wrecking the ancient constitution of this House." [1] The House as a whole was not so uncompromising as Lord Selborne, but the reception of the proposals was so cold as to make it clear that they have not sufficient motive power behind them to force them through any very hostile demonstration from outside. This is important, as when the scheme is looked at from the popular point of view, it becomes clear that it would arouse fierce

[1] House of Lords, July 19, 1922.

resistance as soon as it left the quiet waters of the House of Lords. As the democratic objections to the scheme were not brought out in the House of Lords debates, it is necessary to give them careful consideration.

The argument for a Second Chamber has for years been based upon the claim that, properly constituted, it is the ally and not the opponent of the public will. Lord Peel, in introducing the Government resolutions, rested them upon this doctrine by explaining that the new Second Chamber was " not intended to oppose the *people* but to oppose the *House of Commons* when that House did not respect the settled opinions of the people.[1] " Accepting this as the theory of the Second Chamber, the likelihood that the new House of Lords will act upon it can be judged by a simple test. Is it so constituted as to fulfil its rôle with equal justice to the different opinions in the State ? If it becomes a mere instrument of party warfare, never refusing passage to vital measures from the Lower House when its own party is in office and taking every opportunity to obstruct the measures of the opposing party, it will increase instead of correcting any distortion of the public will.

How does the new House of Lords meet this

[1] House of Lords, July 2, 1922.

test? It is made up of two main elements, elected members and a section of hereditary peers selected by their order. We cannot predict what will be the alignment of parties in the coming generation, but we may be sure that the order of hereditary peers will select supporters of the party or parties of the "right" rather than of the "left." The result is bound to be that the block of hereditary peers will permanently weigh the Second Chamber against the more advanced parties. The degree of this bias will depend upon the proportion of hereditary peers to elected members. But as a moderate party majority is as potent as a large one—and often more potent—the new constitution creates a House of Lords that will be as open as the existing one to the charge of acting on all vital measures as a mere party instrument.

The fourth resolution deals with the new method of defining what is a money Bill. This resolution carries out, with a slight modification, the recommendations of the Bryce Conference, and takes the decision as to what constitutes a money Bill out of the hands of the Speaker, and vests it in a Joint Committee consisting of fourteen members chosen by each of the two Houses, together with the Speaker as Chairman.

"4. That while the House of Lords shall not amend or reject money Bills, the decision as to whether the Bill is or is not a money Bill, or is partly a money Bill and partly not a money Bill, shall be referred to a Joint Standing Committee of the two Houses, the decision of which shall be final. That this Joint Standing Committee shall be appointed at the beginning of each new Parliament, and shall be composed of seven members of each House of Parliament, in addition to the Speaker of the House of Commons who shall be *ex-officio* Chairman of the Committee."

This proposal was discussed in the last chapter, and the conclusion was reached that such a Committee would be more partisan than the Speaker. A glance at the composition of the Committee reveals in whose favour this partisanship is likely to be shown. The two Chambers are to have the same number of representatives on the Committee, but since, as has been shown, the Second Chamber will have a permanent bias to the "right," the final result must be that the Committee will be weighted in the same direction. The actual degree to which this will happen will depend upon the size of parties in the two Chambers, but, since a majority of one is as effective as a majority of any larger size, the Committee will become a new obstacle to the popular forces in the nation. This resolution gives the House of Lords a power that it has never before claimed.

The fifth and last resolution remains. The British constitution has never yet included provisions insisting that Bills on certain selected subjects must only be passed by means of special machinery. The opposite practice is embodied in the constitution of the United States, where Bills proposing to alter any part of the Constitution can only be passed by means of a number of special processes, such as majorities of two-thirds in each chamber, followed by ratification by the legislatives of three-fourths of the States. Such provisions involve as a consequence that Courts of Law can be evoked to declare that certain Bills have been passed in an unconstitutional manner and to practically repeal a Statute. Parliament in this country has hitherto been saved from the confusion and sterility involved in this interference by authorities external to itself. The fifth resolution proposes that this should now be altered.

"5. That the provisions of the Parliament Act, 1911, by which Bills can be passed into law without the consent of the House of Lords during the course of a single Parliament, shall not apply to any Bill which alters or amends the Constitution of the House of Lords as set out in these Resolutions, or which in any way changes the powers of the House of Lords as laid down in the Parliament Act and modified by these Resolutions."

This resolution betrays a strange lack of sense

of proportion. A provision—such as that in the United States—putting special obstacles in the way of every change in the constitution, is arguable, although it has been generally condemned for this country. But this resolution does not make such a proposal. The Crown, the Church, the House of Commons, the Civil Service, the Judiciary, every organ in the State except one, are to continue to take their chance under the existing system. The House of Lords alone is picked out for special protection by the provision that no Bill affecting it can be passed except with its own assent.

This claim to an unprecedented privilege must be coupled with another fact. The absolute veto which the House of Lords would thus obtain over Bills concerning itself was in its possession until the passing of the Parliament Act. But there was a fundamental difference between the position then and the position as this resolution would leave it. In times of crisis the constitution contained a safety valve by which, in the last resort, the resistance of the House of Lords could be overcome. This was the power of "swamping," the right of the Crown acting on the advice of the Prime Minister, to create sufficient new peers to ensure the passage of the Bill that was in dispute. It was only by the

announcement that the Crown would exercise this right that, in the great crises of the Reform Act of 1832 and the Parliament Act of 1911, the House of Lords was forced to give way to the will of the people. But for this power the country would undoubtedly have been plunged into revolution at least once during the last century. The Government resolutions now propose to break this weapon. The third resolution, as has been seen, limits the numbers of the new House of Lords to three hundred and fifty, and the power of creating new members, therefore, cannot be used in any future crisis over their position.

The democratic case against the plan is evident. The new House of Lords will be permanently weighted against the popular forces of the nation, it will have rights over the definition of money Bills that it has never claimed before, and its constitution and powers will be entrenched behind defences permitted to no other body in the State. A plan that is open to such criticism as this would arouse strong resistance, which could only be overcome if there was great determination behind this scheme, but it has created little enthusiasm in the House of Lords itself. The conditions necessary for survival are not present and the resolutions have added one more to

the list of abortive reform schemes that the House of Lords has discussed.

CONCLUSIONS

By gathering together the conclusions that have been drawn in the preceding pages we can sketch the type of Second Chamber that is suggested by the experience of the countries that have been examined. Its composition should be very simple; since, as it is cut off from the sphere of executive policy, it can only be a subordinate element of the constitution and does not justify us in adding greatly to the complexity of government. It may be based, omitting hereditary right, on either nomination or election. Nomination, in a democratic country, means the recommendation of the Prime Minister, and this leads to a series of purely partisan appointments by each Prime Minister in turn. This system, therefore, has all the defects of election, and, at the same time, its undemocratic character renders it unsuitable to a modern constitutional state.

Election may take place either (1) by direct popular vote or (2) by the indirect process of election by local authorities or the House of Commons. Direct election leads to the confusion, labour and expense of a series of general elections

in addition to those for the Lower House. Election by local authorities introduces artificial and unsuitable issues into local politics and fails to give the more advanced parties representation which corresponds to their real strength. Both direct election and election by local authorities contain the danger that a Second Chamber on a representative basis can claim rival authority to the Lower House, a result which is tolerable in the United States, but is inconsistent with the Cabinet system of government on which the British constitution rests.

We are thus left with election by the House of Commons itself as the only means of securing a Second Chamber which has a representative character and is, at the same time, quite free from the danger of contesting the authority of the Lower House. This method is one of the chief political inventions which recent constitutions have adopted, and was accepted by the Bryce Conference as the foundation of three-fourths of the new House of Lords. This will probably be found to be the most valuable contribution which the Bryce Conference has made to the problem. It should be noticed that neither the Bryce Conference nor the modern constitutions that have adopted the device follow the Norwegian practice of electing the members

of the Second Chamber from those of the first. By throwing the right of candidature open to those who are not in Parliament it is easier to introduce into the Second Chamber a proportion of members of legal and technical knowledge and of administrative experience who are specially suited to a revising assembly.

Such a Chamber will be elected on party lines, but all Second Chambers, however selected, exhibit this characteristic. For this reason it should be elected by means of Proportional Representation, so that minority parties will, at any rate, receive their due share of membership. As there is no means of securing a Second Chamber of a non-party character, it is best that it should be selected by each new House of Commons for the lifetime of the Parliament, as it is preferable that it should reflect the existing strength of parties rather than act as an instrument of those which have lost public confidence.

But the best method of dealing with the party composition of a Second Chamber is to recognise that it is inherent in Second Chambers and to accept the consequences. The main consequence is that Second Chambers are not suitable instruments for referring legislation from the Lower House back to the people, the chief function usually assigned to them; for the per-

formance of this duty on party lines adds to, instead of correcting, the misrepresentation of the people's will. If it is desired to diminish the risk that the House of Commons will lose touch with the electorate, the simplest and most obvious plan is to shorten the period for which the House of Commons is elected.

No Second Chamber, therefore, should be entrusted with the right to defeat legislation. Its proper function is to make suggestions for amendments and its power should be confined to securing sufficient delay to ensure that these amendments shall be properly debated, and that sufficient time shall be allowed for the expression of public opinion upon them. A delay of one session could secure this result, but in order to prevent the House of Commons from stifling discussion by means of a Closure, it should be left to the Speaker to determine the length of time necessary for adequate debate, and if this were not given in one session, the Bill should be delayed until the allotted time had been secured. A Second Chamber of this type could carry out effectively the limited functions assigned to it, and would be free from the continual attacks and agitation roused by more ambitious Second Chambers that attempt to fill a rôle that is too large for them.

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